Feb. 2 1875 252-198 Fields

Davis

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~447.~~ 164

ISAAC FRETZ AND CATHERINE, HIS WIFE, APPELLANTS,

vs.

RALPH STOVER, EXECUTOR OF CHARLES STOVER, DECEASED, WILLIAM E. HUXTHALL AND VIRGINIA, HIS WIFE, AND JAMES O. CHILTON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED JULY 9, 1873.

SUPREME COURT OF THE UNITED STATES.

No. 447.

ISAAC FRETZ AND CATHERINE, HIS WIFE, APPELLANTS,

vs.

RALPH STOVER, EXECUTOR OF CHARLES STOVER, DECEASED, WILLIAM E. HUXTHALL AND VIRGINIA, HIS WIFE, AND JAMES O. CHILTON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

INDEX.

	Original.	Print.
Style of suit	1	1
Bill of complaint	1	1
Chancery subpœna	8	3
Deputization	9	4
Return	10	4
Rule: Decree nisi	10	4
Continuance	11	4
Pro confesso	11	4
Agreement of counsel	11	5
Answer of Charles Stover	12	5
Exhibit Y	19	8
Exhibit Z	22	9
Bill of revivor and supplement	23	9
Exhibit Q, (Charles Stover's will)	25	10
Chancery subpœna	30	12
Deputization	32	13
Return	32	13
Answer of Ralph Stover	33	13
Exhibit A	36	14
Exhibit B	37	15
Depoition filed	40	16
Notice	41	16
Interrogatories	41	17
Acknowledgment of service	47	19
Dedimus	47	19
IsaacFretz, sworn	49	20
Exceptions	62	24
Agreement of counsel	62	24
Finaldecree, dismissing	62	25
Appeal allowed	63	25
Appeal-bond	63	25
Clerks certificate	66	26

1 In the circuit court of the United States for the eastern district of Virginia, at Richmond, in said district, on Saturday, the 17th day of May, 1873.

Present, Hon. Hugh L. Bond, judge presiding.

ISAAC FRETZ AND CATHERINE, HIS WIFE, CITIZENS of the State of Pennsylvania, compl'ts,
against
RALPH STOVER, EXECUTOR AND DEVISEE OF Charles Stover, deceased, William E. Huxthall and Virginia, his wife, and James O. Chilton, citizens of the State of Virginia, def'ts.
No. 94. In equity.

Be it remembered that heretofore, to wit, on the 9th day of August, 1869, came the complainant, Isaac Fretz, by his attorney, and filed his bill of complaint against Charles Stover, then alive, William E. Hurxthall and Virginia, his wife, and James O. Chilton, which said bill is in the words and figures following, to wit:

Bill of complaint.

To the judges of the circuit court of the United States for the district of Virginia:

2 Isaac Fretz, of Bucks County, in the State of Pennsylvania, and a citizen of the State of Pennsylvania, brings this his bill against Charles Stover, of Fauquier County, in the State of Virginia, and a citizen of the State of Virginia, William E. Hurxthall and Virginia, his wife, late Virginia Chilton, of Fauquier County, in the State of Virginia, and citizens of the State of Virginia, and James O. Chilton, of Fauquier County, in the State of Virginia, and a citizen of the State of Virginia.

And thereupon your orator complains and says that by the settlement and adjustment of a long-pending litigation in the courts of the State of Virginia, between your orator and Abraham Stover, the father of said Charles Stover, since deceased, during the life-time of Abraham, and after his death with the said Charles Stover as the executor and sole devisee and legatee of said Abraham Stover, he, the said Charles Stover, became indebted to your orator in a large sum of money, and for a part of that indebtedness, that is to say, for the sum of twenty-two hundred and thirty-two dollars and twenty-six cents, he, the said Charles Stover, executed & delivered his bond to your orator, dated ab'ut the first day of April, 1861, payable to your orator for the last-mentioned sum of money and to become due and payable on
3 the first day of March, 1863, & to bear interest from the 1st day of April, 1861; and, to secure the same, made, executed, & delivered a deed of trust, also dated about the 1st day of April, 1861, by which said Charles Stover conveyed to one Samuel Chilton, as trustee, a tract of land known as the Trap branch and Mill farm of said Charles Stover, situated in the county of Fauquier, in the State of Virginia, in trust to secure the payment of the said sum of money in said bond mentioned, with the interest thereon, to your orator; that said bond and the deed of trust securing the sum of money specified in the bond were left with said Samuel Chilton as the attorney at law

of your orator—the deed of trust for record and the bond for collection at its maturity. That long prior to the 1st of April, 1861, at that date, and ever since that date, your orator was, has been, and still is a resident and citizen of the State of Pennsylvania, and the said Charles Stover a resident and citizen of the State of Virginia, and the said Samuel Chilton was a citizen & resident of the State of Virginia from said first day of April, 1861, until his death, which occurred, as your orator is informed and believes, in the early part of the year 1865.

That soon after the execution & delivery of said bond & deed of
4 trust as aforesaid war ensued, and all communication between your orator in Pennsylvania and said Charles Stover and Samuel Chilton in Virginia was forbidden and unlawful. That no communication of any sort was had by your orator with said Charles Stover and Samuel Chilton, or either of them, from the first day of April, 1861, until after the close of the war, when communication became lawful, and your orator knew nothing of what had occurred between sai Charles Stover and Samuel Chilton in the interval between the beginning and the close of the war. When the war had closed your orator caused enquiries to be made into the business left by him in the hands of said Chilton, and was informed, believes, and charges that on or about the 24th day of December, 1862, and some months before the maturity of said bond, the said Charles Stover, finding the said Chilton in great want, and knowing him to be notoriously irresponsible and insolvent, and knowing that confederate treasury-notes were greatly depreciated in places where they were current, and utterly worthless to your orator in Pennsylvania, called on the said Chilton, and induced him to receive confederate treasury-notes at par in payment and discharge of said bond, and took said Chilton's receipt for the sum of money specified in said bond & the interest thereon on the back of said
5 deed of trust.

Your orator charges that the said bond for twenty-two hundred and thirty-two $\frac{26}{100}$ dollars with interest as aforesaid, was given with reference to the gold and silver coin current in the United States as a standard of value, and that said Chilton had no authority to receive payment in any other currency than the lawful money of the United States; that in fact no money consideration was paid by said Charles Stover for said bond, and the pretended consideration was in nowise an equivalent for the value of said bond, but the same was paid at its nominal or par value in an unlawful, revolutionary currency, issued by an insurgent authority at war with the United States and with the State of Pennsylvania, greatly depreciated in value at home, and utterly worthless beyond the bounds of the States declared to be in a state of insurrection.

And your orator charges that the said Samuel Chilton had no lawful authority, as trustee or otherwise, to receive, nor had the said Charles lawful authority to pay said bond in such worthless paper so as to be binding or obligatory on your orator. And your orator believes and charges that such payment was the result of an unlawful and fraudulent combination between said Charles Stover and Samuel Chilton to defraud your orator in the premises; and your or-
6 ator is advised, believes, and charges, that said pretended payment in confederate money was not an extinguishment of said debt, but that said Charles Stover is still legally liable therefor, and that said deed of trust, although it was never recorded, was, and still is, a valid and binding security for said debt between the parties to the said deed of trust.

Your orator further shows unto your honor that he is informed & believes and charges that said bond & deed of trust are in the possession of said Stover, & therefore he cannot be precisely accurate as to the dates and amounts of the same; but your orator believes that he has given the same with substantial accuracy; that your orator is entitled to the possession of said bond, and to have the property conveyed by said deed of trust sold, and the proceeds of sale applied to the payment of said debt & interest.

Your orator is further informed and believes that the said Samuel Chilton, who died about the year 1865, as aforesaid, left two children, his heirs at law, viz: Virginia, now the wife of William E. Hurxthall, of the county of Fauquier, in the State of Virginia, and James O. Chilton, of the same county and State.

Wherefore and inasmuch as your orator is remediless in the premises except in a court of equity, where such matters are properly
7 cognizable and relievable, your orator prays that the said Charles Stover, William E. Hurxthall and Virginia, his wife, late Virginia Chilton, and James O. Chilton (all of whom are residents and citizens of the county of Fauquier aforesaid, & to which said Virginia & James O. the legal title to the land conveyed by said deed of trust passed & descended as children & heirs at law of said Samuel Chilton, dec'd) be made parties defendants to this bill of complaint, with apt and fit words to charge them as such; and that they and each of them be required to make full, true, direct, and perfect answer to all and singular the allegations in this bill contained, & that as fully & particularly as if the same were here repeated & they thereto specially & particularly interrogated under the respective oaths or affirmations of said several parties defendants.

That, by the order & decree of this honorable court, that your orator be declared to be entitled to the possession of the said bond, and that unless the sum of money therein mentioned, with the interest thereon, be paid, that then the real estate conveyed by said deed of trust be sold, & the proceeds applied to the payment of your orator's just demand. And to this end that said Charles Stover be required to produce the said bond and deed of trust.

8 And your orator further prays your honors to make all such orders and decrees and to grant to your orator such other & further general relief in the premises as the nature & circumstances of the case may require and to equity appertains. And that all necessary process may be issued directed to the defendants commanding them to appear, &c. And your orator will ever pray, &c.

WISES & FITZHUGH,
Solicitors for Complainant.

Thereupon a subpœna in chancery was issued, which, with the deputization and return thereon, is as follows, to wit:

Chancery subpœna.

UNITED STATES OF AMERICA,
District of Virginia, ss:

The President of the United States of America to Charles Stover, William E. Murxthall, and Virginia Murxthall, his wife, and James O. Chilton, citizens of the State of Virginia, greeting:

We command you and every one of you that you appear before our

judges of our circuit court of the United States of America for the district of Virginia, at the court-room in the custom-house, in the
9 city of Richmond, in said district, on the first Monday in the month of September next, to answer the bill of complaint of Isaac Fretz, a citizen of the State of Pennsylvania, this day filed in the clerk's office of said court, in said city of Richmond, then and there to receive and abide by such judgment and decree as shall then or thereafter be made upon pain of judgment being pronounced against you by default.

To the marshal of the district of Virginia to execute.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Richmond aforesaid, this 9th day of August, in the year of our Lord one thousand eight hundred and sixty-nine, and of our Independende the 94th.

[SEAL.] W. H. BARRY, *Clerk.*

Memorandum.—The above-named defendants are notified that unless they enter their appearance in the clerk's office of said court, at Richmond aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as confessed, and a decree entered accordingly.

W. H. BARRY, *Clerk.*

Deputization.

U. S. MARSHAL'S OFFICE,
10 *Richmond, Va., August 9th*, 1869.

I hereby depute the sheriff of Fauquier Co., or his deputy, as a special deputy to execute this writ, and make return in due form.

D. B. PARKER,
U. S. Marshal.

Marshal's return.

Executed this 12th day of August, 1869, by delivering to Charles Stover and W'm E. Murxthall, alias Hurxthall, and Virginia, his wife, and James O. Chilton, alias James V. Chilton, the within-named defendants, in person, a true copy of this writ.

W'M H. BOYD,
Special Deputy Marshal, Sh'ff Fau. Co.

Decree nisi.

And at another day, to wit, at rules held in the clerk's office of said court on the first Monday in September, 1869, the subpœna in chancery in this cause having been returned, executed, and the defendants failing to appear, it is ordered that unless they shall appear according to law, the bill in this cause will be taken for confessed, and the court will decree accordingly.

11 *Continuance.*

And at another day, to wit, at rules held as aforesaid on the first Monday in October, 1869, this cause is continued until the next rule.

Pro confesso.

And at another day, to wit, at rules held as aforesaid on the first Monday in November, 1869, the defendants still failing to appear, it is

ordered that the bill filed herein be taken for confessed, and this cause set for hearing at the next term of this court.

And at another day, to wit, at a circuit court of the United States for the eastern district of Virginia, on Tuesday the 30th day of May, 1871, the following paper was filed:

Agreement of counsel.

"I think Mrs. Fretz ought to be made a party in our Fretz & Stover suit, & that Chilton's representative ought not, but no answer has been filed & the bill is taken for confessed. If Mr. Forbes consents, I will alter our bill as suggested, & and permit his answer to be filed, and the case retain its place upon the docket."

The above is an extract from Wises' letter. I agree to the above proposition, May 17, 1871.

I. M. FORBES,
One of Stover's Counsel.
I. V. CHILTON,
Ad'r of Sam'l Chilton, Dec'd.

12 And thereupon the following order was made and entered by the court.

Answer filed and bill amended by leave of court.

By consent it is ordered that the defendants be allowed to file their answer as of this day, and the plaintiff to amend his bill by inserting the wife of plaintiff as a party plaintiff in this case.

Answer of Charles Stover.

The separate answer of Charles Stover to a bill of complaint exhibited against him and others in the circuit court of U. States for the district of Virginia by Isaac Fretz:

This respondent, reserving to himself the benefit of all proper exceptions to the numerous errors and imperfections of said bill of complaint, for answer to so much thereof as he is advised it is material for him to answer, saith: That on the 8th day of April, 1861, this respondent executed his bond to the complainant, Isaac Fretz, and Catharine, his wife, for the sum of twenty-three hundred and sixty-six dollars & eighteen cents, (principal money without interest,) payable on or before the 1st day of March, 1863; that said bond was delivered on the day of its date to
13 Samuel Chilton, now deceased, as agent and attorney for said Isaac Fretz & wife, in compliance with arrangements made in compromise & settlement of the litigation between said Fretz and wife and respondent referred to in complainant's bill; in which litigation & compromise the said Chilton had been the acknowledged agent and attorney of said Fretz and wife. At the period of the execution & delivery of said bond, this respondent executed a deed of trust to said Samuel Chilton as trustee, conveying to him a tract of land, then & still owned & occupied by this respondent, with a mill thereon known as the "Trap Branch mill," containing about 135 acres, situate in Fauquier County, Virginia, near Thoroughfare Gap, in trust to secure the payment of said bond. And the said deed was duly acknowledged by this respondent, who was never married, on the day of its date, before a justice of the peace for recorda-

tion, but it was then agreed that said deed of trust should be withheld from recordation in Fauquier County court clerk's office until said Chilton should think proper to place the same on the record, it being the avowed purpose of this respondent to pay off the said bond at as early a period as he might be able to pay it, for which reason & with a view to that right on respondent's part, the terms of the bond were,
14 "on or before the 1st day of March, 1863, I bind myself, &c., to pay, &c.;" this respondent always entertaining great repugnance to permitting a debt to hang over him, and being anxious to have (& providing accordingly for) the right to discharge this debt prior to its maturity as soon as he might be able. The said Chilton never deemed it necessary to place said deed upon record, & retained it with the bond in his possession. On the 30th day of December, 1862, this respondent paid to said Chilton, as attorney & agent for said Fretz & wife, the sum of eleven hundred dollars in notes of the banks of the State of Virginia, which he had been accumulating and saving from time to time as he was able so to do, with the purpose of applying the same to the partial discharge of said debt. This respondent is certain that no portion of said $1,100\frac{00}{100}$ was paid in any other currency than that above stated; and on the 15th day of January, 1863, this respondent paid to said Samuel Chilton, as attorney for said Fritz & wife, the sum of twelve hundred & sixty-six dollars in full of the said bond, & thereupon said Chilton delivered the said bond to this respondent, having endorsed upon it the credit of $1,100 on the day of its payment, & signed the said endorsement "Samuel Chilton, att'y for Stover & wife,"
15 meaning Fretz, but *but* writing Stover instead by mistake, for, as above stated, this respondent was never married, and "res ipsa loquitur." And on the day of the last payment of $1,266\frac{00}{100}$, the said Chilton also endorsed the payment thereof in full on said bond, & signed his name thereto as attorney, before delivering the said bond to this respondent. And said Chilton at the same time delivered to respondent the trust-deed before referred to, after endorsing thereon the acknowledgement of the fact of payment in full of said bond by respondent to him, and that said deed was fully discharged & satisfied, & signing his name as trustee thereto. Respondent files herewith as part of this answer the original bond and trust-deed, with the endorsements above set forth thereon, marked Exhibits Z & Y, which are produced in compliance with the call made upon respondent by the complainant in his bill.

This respondent, further answering, states that the payment of $1,266\frac{00}{100}$ was made in the currency known as Confederate States treasury-notes, as well as this respondent remembers, the said Chilton, at the time of payment nor at any other time, making no objection to receiving the same, and this respondent using no persuasion nor presenting no inducements or argument to him to receive the same.

16 This respondent, further answering, states that he denies that he was induced to pay the said sums of money in advance of the maturity of said bond because he found said Chilton "in great want & knew him to be notoriously insolvent," and because "of a depreciation of the money in which said payments were made, or because the same was worthless to said Fretz & wife." On the contrary, respondent believed said Chilton was an upright & faithful and honest man and agent. This respondent's experience with him as counsel & attorney, & agent for his adversary & his father's adversary for many years in the litigation before referred to, had given assurance to this respondent of his fidelity and ability as such. And this respondent denies that he in-

duced said Chilton to receive payment in the currency in which said payments were made as above stated. And he denies that said payments were the result of an unlawful & fraudulent combination between this respondent and said Chilton. And further denies all fraud and imputation of fraud on the part of respondent contained in complainant's bill. Respondent, further answering, is advised & submits that the payments aforesaid are in justice & law a full discharge and satisfaction of the said debt and of the trust-deed aforesaid; and that
17 even if it be that the same were made in time of war, and that said complainant was a citizen of the State of Pennsylvania, with which the State of Virginia or the Confederate States so-called were at war, which this respondent is advised was not the fact, and calls for proofs thereof, but is advised & submits that the State of Virginia was the scene of an insurrection, and that under the Co'stitution of the United States there cannot be war between *between* said State of Virginia & the United States, or any of them, yet the payments aforesaid were valid payments, & effectual to discharge said debt & trust-deed; and that there is not now due any portion either of the principal or interest demanded by said complainant in his bill.

This respondent further submits that if he be in error in the positions hereinbefore assumed by him in this answer, yet the said payments may have been due to said Samuel Chilton for and on account of his compensation for his professional services rendered the said Fretz & wife in the long litigation which had been waged between said Fretz & wife and this respondent's father, Abraham F. Stover, and this respondent as his executor and in his own right after the death of said Abraham; a litigation which existed for many years, commencing
18 in the circuit court of Fauquier County, and being carried thence by appeal to the supreme court of appeals of Virginia, in which the judgment in favor of said Fretz & wife in the circuit court of Fauquier was affirmed by an equal division of opinion on the part of the judges of the supreme court of appeals. And after that said litigation was renewed by a suit against this respondent in the circuit court of Fauquier, which was compromised as aforesaid. In the whole of this litigation this respondent avers that Samuel Chilton aforesaid bestowed his professional services as attorney & counsel in behalf of said Fretz & wife, as well in the court of appeals of Virginia as in the circuit court of Fauquier. What the compensation for said services was to be this respondent is ignorant of. But he is advised & submits that, if the positions taken by respondent in this answer be important to protect him, that to the extent of the compensation due by said Fretz & wife to said Chilton he should not be compelled to pay a second time. And he submits that the personal representative of said Samuel Chilton should be made a party defendant by the complainant to his bill, and that enquiry should be ordered by this hon. court to ascertain what sum was due to said Chilton for said compensation by said Fretz & wife.
19 This respondent also submits that Katharine Fretz, the wife of said complainant, should be a party to this cause, and that said complainant has no right to prosecute this suit in his own name alone.

And having fully answered, prays hence to be dismissed with his costs, &c.

CHARLES STOVER.

Affidavit.

FAUQUIER COUNTY,
State of Virginia, to wit:

Charles Stover this day personally appeared before me, a justice of the peace in & for the county of Fauquier, State of Virginia, & made oath that the facts stated in the foregoing answer upon his own knowledge are true, & those stated on information derived from others he believes to be true.

Witness my hand this 2nd October, 1869.

H. H. ROBERTSON, *J. P.*

EXHIBIT Y.

This indenture, made this 8th day of April, 1861, between Charles Stover, of Fauquier County, Virg'a, of the first part, Samuel Chilton, of the second part, and Isaac Fretz and Catharine, his wife, of the county of Bucks, of the State of Pennsylvania, of third part, witnesseth:

20 Whereas, the said Charles Stover is indebted to the said Isaac Fretz & Catharine, his wife, by bond dated the 8th day of April, 1861, for the sum of twenty-three hundred & sixty-six dollars & eighteen cents, due & payable on the first day of March, 1863, the payment of which, when the same becomes due, the said Stover is anxious to secure to said Fretz & wife: Now, therefore, for and in consideration of the premises and of the sum of five dollars to said Stover by said Chilton in hand paid at and before the sealing & delivery of these presents, the receipt whereof is hereby acknowledged by said Stover, he, the said Stover, hath given, granted, bargained, & sold, and by these presents doth give, grant, bargain, & sell & convey unto said Chilton & his heirs, forever, the tract of land now owned by said Stover, situate in Fauquier County, Virginia, with a mill thereon, known as the "Trap Branch Mill," being the same tract of land purchased by Abraham F. Stover, the father of said Charles, from the late William Skinker, and conveyed by said Skinker to said Abraham F., by deed dated the 13th day of October, 1834, and of record in Fauquier County court, to which reference is hereby made for a more specific description of said tract, which

21 contains about one hundred & thirty-five acres, more or less, & which was conveyed to said Charles Stover, by Abraham Stover & wife, by deed dated 1 Dec'r, 1846, also of record in Fauquier County court, to have and to hold the said tract of land & mill aforesaid, with all privileges & appurtenances to the same belonging, unto him the said Samuel Chilton & his heirs, forever; but upon trust, nevertheless, that in case the said Charles Stover, his executors or assigns, shall fail to pay to said Fretz & wife the debt hereinbefore stated when the same shall become due, then the said Chilton, so soon thereafter as he may be required by said Fretz & wife, sell the said property herein conveyed to the highest bidder, at public auction, for cash, after having advertised the time & place of sale for at least 30 days prior thereto; and out of the proceeds of sale shall pay—1st, the expenses attending the execution of this trust; 2'ly, the debt aforesaid due said Fretz & wife, with all interest that may have accrued thereon, & the surplus, if any, shall pay to said Stover. And said Stover doth warrant, generally, the title to said land.

In testimony whereof the parties have hereunto set their hands & seals the day & year first above written.

CHARLES STOVER. [SEAL.]
SAMUEL CHILTON. [SEAL.]

22 FAUQUIER COUNTY, *to wit:*

I, William P. Ficklin, a justice of the peace in & for said county of Fauquier, in the State of Virginia, do certify that Charles Stover, whose name is signed to the above writing, bearing date the 8th day of April, 1861, has acknowledged the same before me, in my county aforesaid.

Given under my hand this 8th day of April, 1861.

W. P. FICKLIN, *J. P.*

Endorsement.

The bond mentioned in this deed of trust has been this day paid to me in full by Mr. Charles Stover, the obligor, and said deed of trust is fully discharged and satisfied.

SAM'L CHILTON, *Trustee.*

15th day of January, 1863.

Exhibit Z.

On or before the first day of March, 1863, I bind myself & my heirs to pay unto Isaac Fretz and Catharine, his wife, the just and full sum of twenty-three hundred and sixty-six dollars and eighteen cents, ($2,366.18.)

23 Witness my hand *hand* and seal this 8th day of April, 1861.

CHARLES STOVER. [SEAL.]

Endorsements.

DEC'R 30TH, 1862.—By cash, $1,100.

SAM. CHILTON,
Att'y for Stover & Wife.

JAN'Y 15TH, 1863.—By cash, $1,266, in full of the within note.

SAM'L CHILTON, *Att'y.*

And at another day, to wit, on the 16th day of January, 1873, came the complainants, by their attorneys, and filed a bill of revivor and supplement, which is as follows:

Bill of revivor and supplement.

In the circuit court of the United States for the eastern district of Virginia.

To the honorable judges thereof:

Isaac Fritz, & Catherine, his wife, citizens and residents of Bucks County, Pennsylvania, bring this their bill of revivor and supplement againt Ralph Stover, executor and sole testamentary devisee of Charles Stover, deceased, William E. Hurxthall, and Virginia Hurxthall,

24 his wife, and James O. Chilton, all of whom are citizens and residents of the county of Fauquier, and State of Virginia; and

thereupon complainants say that on August 9th, 1869, your orator, Isaac Fritz, exhibited his bill in chancery, in this honorable court, against Charles Stover, the defendants Hurxthall and Chilton, and praying for certain relief. At the time said original bill was filed your orator Isaac expressly stated that he had never seen the bond and deed of trust on which he sued, it having been altogether in the hands of one Samuel Chilton and said Charles Stover.

May 30th, 1871, said Charles Stover answered said bill, and with his answer filed said bond and deed of trust, which appear to have been given to your orator Isaac and your oratrix Catherine, jointly, by reason whereof it is proper to join your oratrix Catherine as a party plaintiff. Since said Charles Stover filed his answer, he has departed this life, leaving a will wherein he devised the real estate, which is sought to be charged in this suit, to Ralph Stover, and nominated said Ralph as his sole executor; said Ralph has duly qualified as such. A copy of said will and certificate of qualification is herewith filed as Exhibit Q. By reason of the above facts it is necessary to make said Ralph Stover a party defendant.

25 Wherefore complainants pray that your oratrix Catherine may be made a plaintiff in this cause, and that this suit may be revived against Ralph Stover, executor of Charles Stover, deceased; that they may have the same relief which was prayed for in the original bill by your orator Isaac; that proper process may issue hereon against said defendants, and complainants may have such other and further relief in the premises as the nature and circumstances of this case may require, and to this honorable court may seem meet.

ISA'C FRITZ & CATHERINE, HIS WIFE,
By H. A. & J. S. WISE,
Their Counsel.

JANUARY 16TH, 1873.

Copy of Charles Stover's will.—Exhibit Q.

BUCKS COUNTY, *ss:*

By the tenor of these presents, I, John T. Murfit, register for the probate of wills and granting letters of administration, in and for the county of Bucks, in the Commonwealth of Pennsylvania, do make known unto all men, that on the day of the date hereof, at Bucks county, before me, was proved and approved the last will and testament of Charles Stover, late of Scott township, Fauquier County, State of Virginia, deceased, who died in the county of Bucks, State of Pennsylvania,

26 (a true copy whereof is to these presents annexed,) who having whilst he lived, and at the time of his death, divers goods, chattles, and credits within the said Commonwealth of Pennsylvania, by reason whereof the approbation and insinuation in the last will and testament, and the committing the administration of all and singular the goods, chattels, and credits, which were of the said deceased, and also the auditing the accounts, calculations, and reckonings of the said administration and final dismission from the same to me, are known to belong, and that administration of all and singular the goods, chattels, and credits of the said deceased, in any way concerning his last will and testament, was committed to Ralph Stover, the executor in the said testament named, he having been first duly qualified well and truly to administer the goods, chattles, and credits of the said deceased, and make a true and perfect inventory thereof, and exhibit the same

{ REGISTER'S SEAL. }

into the register's office of the said county, within thirty days from the date hereof. And also a true and just account, calculation, and reckoning of his administration at the said office to render within one year from the date hereof, or when legally hereunto required. The said will having been proved before me upon the oaths of Benjamin S.
27 Rich and Benjamin Harwick, the two subscribing witnesses to said will, who were present and saw and heard the testator, Charles Stover, sign, seal, and execute said will, and who subscribed their names as witnesses thereto in the presence of the said testator, and of each other. The said testator at the time of signing said will being of a sound and disposing mind and memory.

In witness whereof, I have hereunto set my hand and seal of office at Douglestown, Bucks County, Pennsylvania, the twelfth day of June, in the year of our Lord one thousand eight hundred and seventy-two.

JOHN T. MURFIT,
Register.

I, Charles Stover, of Scott township, in Fauquier County, in the State of Virginia, do make and publish this my last will and testament, in manner and form following, to wit:

First. I do order and direct that all my just debts and funeral expenses be duly paid and satisfied as soon as conveniently can be after my decease.

ITEM. I give, bequeath, and devise unto my brother Ralph Stover, of the township of Tinicum, in the county of Bucks, and State of Pennsylvania, the whole of my estate personal and real estate in Fauquier County, in the State of Virginia, and elsewhere, to him and
28 to his heirs and assigns forever.

And lastly, I nominate, constitute, and appoint my said brother Ralph Stover to be the executor of this my last will and testament.

In witness whereof I have hereunto set my hand and seal this twenty-fourth day of February, one thousand eight hundred and seventy-two.

CHARLES STOVER. [SEAL.]

Signed, sealed, and delivered by the said testator as his last will and testament in the presence of us,

BENJ. S. RICH,
BENJ. HARWICK.

BUCKS COUNTY, *ss:*

I do hereby certify the foregoing to be a true copy of the will of Charles Stover, as the same was duly proved when registered and filed in this office.

Witness my hand and seal of office, at Douglestown, June twelfth, A. D. 1872.

[OFFICIAL SEAL.] JOHN T. MURFIT,
Register.

Fauquier County court, June 28th, 1872.

29 An authenticated copy of the last will and testament of Charles Stover, deceased, and the certificate of the probate thereof, under the hand and official seal of John T. Murfit, register for the probate of wills and granting letters of administration in and for the county of Bucks, in the Commonwealth of Pennsylvania, was offered to the court for probate by Ralph Stover, and it appearing from such copy

and certificate that the said will of Charles Stover, deceased, was proved before the register for the probate of wills for the said county of Bucks, in the State of Pennsylvania, to have been so executed as to be a valid will of lands in this State by the laws thereof, said copy is admitted to probate as a will of real estate and also of personalty, and is ordered to be recorded as the true last will and testament of Charles Stover, deceased. Ralph Stover, the executor therein named, made oath as the law requires, and, together with A. D. Smith, his surety, who justified as to his sufficiency, entered into and acknowledged bond in the penalty of five thousand dollars, payable and conditioned according to law. Whereupon certificate is granted the said Ralph Stover for obtaining probate of said will in due form of law.

Ordered, that Charles P. Jones, T. B. Robertson, Tho's Henderson, W'm H. Lewis, and A. D. Smith, or any three of them, being first
30 duly sworn, do appraise the personal estate of Charles Stover, deceased, and return their appraisement under their hands to Hambleton Shepperd, com'r of accounts of this court.

Teste:

W'M M. HUME, *Clk.*

A copy. Teste:

T. N. FLETCHER, *C. C.*

Thereupon a subpœna in chancery was issued, which is in the words and figures following, to wit:

Chancery subpœna.

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

The President of the United States of America to Ralph Stover, executor and sole testamentary devisee of Charles Stover, deceased, William E. Hurxthall, and Virginia Hurxthall, his wife, and James O. Chilton, citizens and residents of the county of Fauquier, State of Virginia, greeting:

We command you and every one of you that you appear before our judges of our circuit court of the United States of America for the eastern district of Virginia, at the court-room in the custom-house in the city of Richmond, in said district, on the 1st Monday in the
31 month of March next, to answer the original bill of complaint of Isaac Fretz, heretofore filed, and the bill of revivor and supplement of Isaac Fretz and Catherine, his wife, citizens and residents of Bucks County, Pennsylvania, this day filed in the clerk's office of said court in said city of Richmond, then and there to show cause, if any they have, why the cause should not be revived, and to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the eastern district of Virginia to execute.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Richmond aforesaid, this 16th day of January, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the 97th.

[SEAL.] M. F. PLEASANTS, *Clerk.*

MEMORANDUM.—The above-named defendants are notified that unless they enter their appearance in the clerk's office of said court, at Rich-

mond aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as confessed, and
32 a decree entered accordingly.

M. F. PLEASANTS, *Clerk.*

Deputization.

U. S. MARSHAL'S OFFICE,
Richmond, Va., Feb. 4th, 1873.

I hereby depute the sheriff of Fauquier Co., or his deputy, as special deputy to execute this writ and make return in due form.

DAVID B. PARKER,
U. S. Marshal.

Marshal's return.

Executed this 12th day of February, 1873, on Ralph Stover, by delivering to a white member of his family, over 16 years of age, a copy of this writ, & explaining purport thereof, he being absent therefrom at the time.

JOS. H. NELSON,
Special Deputy Marshal.

Acknowledgment of service.

I acknowledge service of the summons to answer the bill of revivor and supplement vs. Ralph Stover, executor and sole testamentary
33 devisee of Charles Stover, deceased, W'm E. Hurxthall and Virginia, his wife, and others, for myself, improperly called James O. Chilton, Isabella E. Chilton, W'm E. Hurxthall & wife.

J. V. CHILTON,
Att'y for W'm E. Hurxthall & Virginia, his Wife, Isabella E. Chilton, & J. V. Chilton.

And at another day, to wit, at a court held as aforesaid on the 7th day of May, 1873, came the defendant, Ralph Stover, and filed his answer, which, with the exhibits filed therewith, is as follows:

Answer of Ralph Stover.

The separate answer of Ralph Stover to the bill of revivor and supplement against him, executor and sole testamentary devisee of Charles Stover, deceased, & others, in the circuit court of the U. States for the eastern district of Virginia, by Isaac Fretz.

This respondent, reserving to himself the benefit of all proper exceptions to the numerous errors & imperfections of said bill, for answer to so much thereof as he is advised it is material for him to answer, claiming the benefit of the answer filed by said Charles Stover, & for an
34 amendment to said answer, saith:

That he submits that said Isaac Fretz exhibited his bill in chancery in said court against said Charles Stover & others as stated; that said Charles Stover died leaving a will, as therein stated, devising the said real estate to this respondent.

Respondent further says that the deed of trust referred to in the original bill was made in pursuance of a certain compromise & agree-

ment, which is filed herewith, & marked Exhibit A, and prayed to be made a part hereof, & he insists that the said complainant had no right to set up & enforce said deed of trust until he had complied with the terms of said compromise on his part, & he avers & charges that he has not complied with such terms, in that he has not discharged the judgments or entered satisfaction thereof, or of the lien, as he therein agreed to do.

Respondent further says that he is informed & believes that the said Samuel Chilton was the agent of said Fritz, with full power & authority to settle & receive satisfaction of said deed of trust; that payments were made as appears by Exhibit B, filed herewith, & prayed to be made a part thereof, to said Chilton, who in receiving such payments & in satisfying the said deed of trust, acted within the authority conferred upon him by the said complainant.

35 Respondent further says, whatever may have been the authority or want of authority of said Chilton, in receiving such payments & satisfying the said deed of trust at the time, yet, that his acts in so doing were ratified by said complainant after they came to his knowledge; that when he became informed thereof, in 1865, as he states in his bill of complaint, said Chilton was & continued to be his agent & attorney in relation thereto; that said complainant did not disavow or object to such acts before the death of said Chilton, which occurred in 1867, & did not disavow such acts or object to them until the commencement of this suit.

And now, having fully answered, this respondent prays to be hence dismissed with his costs.

WHITTLESEY & WILLOUGHBY,
Sol. for Respondent, Ralph Stover.

STATE OF PENNSYLVANIA,
County of Bucks, ss:

On this third day of May, 1873, came before me Ralph Stover, & made oath that the facts set forth in the above answer are true to his knowledge, except as to the matters stated upon information and belief, & as to those matters he believes them to be true.

[NOTARIAL SEAL.] HENRY C. MICHENER,
Notary Public.

36 *Exhibit A, with answer of Ralph Stover.*

EXHIBIT A.

Whereas there is now pending in the circuit court of Fauquier County, Virg'a, a litigation between Isaac Fretz, jr., & Catharine, his wife, late Catharine Stover, as plaintiff in chancery, and Charles Stover, as defendant, which the said parties have arranged, now, this agreement witnesseth the following as the terms of said arrangement or compromise:

Said Stover agrees to pay to said Fretz, in cash, the sum of one thousand dollars, and to execute his bond to said Fretz for the sum of twenty-five hundred & thirty-five dollars & forty-eight cents, payable on the 1st day of March, 1861, and to execute his bond to said Fretz, payable on 1st day of March, 1862, for $2,299.22.

And also his bond to said Fretz, payable on 1st day of March, 1863, for $2,366.18, and to secure the payment of the said bonds by placing in such person's hands as may be agreed on, bonds of others to said

Stover, which may be regarded by said Fretz's counsel, Sam'l Chilton, as solvent.

And upon said Stover's complying with the above terms & in
37 consideration thereof, said Fretz & wife agree to discharge the judgment obtained by them in the circuit court of Fauquier County, Va., vs. W'm M. Hume, sheriff of Fauquier County, Va., ad'r of Abram F. Stover, deceased, satisfied.

And also to enter satisfaction of the judgment obtained by Isaac Fretz & Catharine, his wife, on 23 June, 1834, in the court of common pleas of Bucks County, Pennsylvania, against Abraham F. Stover, for $5,549.22, & $12.67 damages & costs.

And also to enter satisfaction of the orphans' court lien, in Bucks County, Pennsylvania, in the matter of the accounts of Abraham F. Stover, guardian of Catharine Stover, minor child of Joseph Stover, deceased, confirmed nisi, Feb'y 13, 1833, showing a balance of $4,895 & an half cents, in said Abraham F. Stover's hands.

And said parties in testimony thereof have hereto set their hands this 25th Feb'y, 1861.

ISAAC FRETZ.
CHARLES STOVER.

Exhibit B, with answer of Ralph Stover.

EXHIBIT B.

Ch's J. Stover owes Fretz 1 March, 1861, bal. in cash of			$535 48
He discharges this am't by bond of Cuthbert & Elizabeth Owen's bond, principal	$410 69		
38 Int. fr' 1 Jan'y, 1859, to 1 Mar., 1861	$53 38		
Deduct int. on $53.38 fr' 1 Mar., 1861, to 1 Aug., 1861	1 32	52 06	
			462 75
Bal. due			$72 73
Am't due 1 March, 1862			$2,299 22
Stover discharges this am't by bond of S. P. Bayly, C. Carter, J. H. Carter, jr., on which is due a balance of	$1,178 33		
Int. fr' 24th Jan'y, 1861, to 1st March, 1862, 1 y'rs 33 days, $77.17	77 17		
By bond of P. A. L. Smith and W'm Temple Smith	751 81		
Int. fr' 16 Mar., 1861, to 1 Mar., 1862	43 23		
By note of S. P. Bayly for	186 50		
Int. fr' 1 Jan'y, 1860, to 1 Mar., 1862, 2 y'rs 2 m.	24 24		
	$37 94	$2,261 28	
	2 19 int. for 11 mo's off	37 94	
Bal. due	$35 75	$2,299 22	

39 *Receipt Mar. 25, 1861.*

Received, 25 Mar., 1861, of Charles Stover, seventy-two dollars & sev-

enty-three cents balance in cash due, as per within statement by him to Isaac Fretz & wife, on cash payment due 1 Mar., 1861; also the bond of Cuthbert & Elizabeth Owens to him specified within, which satisfies the balance of $535.48, due, by agreement between Fretz & wife & said Stover, on 1st March, 1861; also thirty-five dollars & seventy-five cents in cash and the bonds specified in within statement, which are taken in satisfaction of the payment to be made by said agreement on 1 March, 1862.

SAM'L CHILTON,
Att'y for Isaac Fretz and Catharine, his Wife.

Receipt Apr' 8, 1861.

Rec'd, 8 April, 1861, of Charles Stover, his bond to Isaac Fretz & Catharine, his wife, for twenty-three hundred & sixty-six dollars & eighteen cents, payable 1 March, 1863, dated 8 April, 1861, secured by deed of trust on "Trap Branch" mill & land, executed by said Stover to me as trustee, dated this day, which is in full compliance on the part of said Stover with the agreement of compromise & settlement of the matters in controversy between said Stover and said Fretz & wife, dated 25th day of February, 1861. Witness my hand the day & year aforesaid, the other terms of said agreement having been complied with by said Stover, as appears by the foregoing statement & receipt.

SAM'L CHILTON,
Att'y for Isaac Fretz and Catharine, his Wife.

Receipt Dec'r 30, 1862.

Received, this 30th Dec'r, 1862, of Charles Stover, eleven hundred dollars in part payment of the bond of twenty-three hundred & sixty-six dollars & $\frac{18}{100}$, executed by said Stover, dated 8 Ap'l, 1861, described in preceding receipt in my hands for collection as att'y.

SAM'L CHILTON,
Att'y for Fretz & Wife.

Receipt Jan'y 15, 1863.

Jan'y 15th, 1863, rec'd of Mr. Charles Stover, twelve hundred & sixty-six dollars ($1,266) in full of his note for $2,366.18, mentioned in the above receipt.

SAM'L CHILTON,
Att'y for Fretz & Wife.

Deposition filed.

The following deposition was filed as evidence in this cause on behalf of complainants:

NOTICE.

To W'm Green, esqr., counsel for the defendants in the case of Isaac Fretz vs. Charles Stover et al., in equity, in the circuit court of the U. States, district of V'a:

SIR: Please take notice that the counsel for the plaintiff in the above

cause will apply for a commission to take the testimony of the plaintiff, Isaac Fretz, in the above cause, in vacation, in answer to the following interrogatories filed in the clerk's office of said court, in order that you may file cross-interrogatories before issuing of the commission. The deposition of said Fretz will be taken at the office of James B. Lambert, notary public, in Douglestown, Bucks County, Pennsylvania, on Monday, the 29th day of August, A. D. 1870.

Interrogatories by plaintiffs' counsel:

Question 1st. Had you & wife a suit in litigation, in the courts of Virginia, commencing in the circuit court of Fauquier County, and carried thence by appeal to the supreme court of appeals of Virginia, with a certain Abraham Stover, a citizen of the State of Virginia, in his lifetime, and is he now dead?

Q. 2nd. When did he die, and what became of that suit?

42 Q. 3rd. Was Charles Stover, one of the defendants in this suit, left his executor and sole devisee and legatee?

Q. 4th. Was the suit revived against him, Charles, as ex'r of him, Abraham Stover?

Q. 5th. Did you & said Charles Stover thereafter settle & adjust said suit?

Q. 6th. Did he become indebted to you by said adjustment, & in what sum?

Q. 7th. Did he execute & deliver to you a bond in consideration of said adjustment? If so, what was the principal sum; when was bond dated, payable to whom, and when; signed by whom; in whose possession left?

Q. 8th. Was said bond secured by a deed of trust; signed & executed by whom; by whom witnessed; to whom delivered; in whose possession left?

Q. 9th. Who was your attorney at law; if Sam'l Chilton, of Fauquier Co., Va., did you know his pecuniary condition & responsibility at the time; and what relations had he with Charles Stover; was he his county-man & neighbor, or related to him any way?

Q. 10th. What amount of fees or professional compensation had you paid to him before his death for his services in the suit of yourself

43 & wife or in said adjustment; and did you owe him for any fees or balances of fees for services rendered you in this or any other behalf when he died; or after said adjustment; and if any, what amount were you so indebted to him?

Q. 11th. Upon what property or estate was the said deed of trust taken, and to whom was it given?

Q. 12th. Did you ever have any agreement or understanding with said Charles Stover & Sam'l Chilton or other person that said deed of trust was not to be recorded; and if you know, state whether it was recorded, and if not, why not?

Q. 13th. When did you return to your home after this adjustment; and where was then your home, & where has it been ever since?

Q. 14. After returning to your home, after leaving the said bond and deed of trust as you have stated, with the person named, did said Charles Stover or Samuel Chilton ever communicate or have intercourse with you, in person, or by letter, or other correspondence, in relation to said bond and deed of trust, or the payment, or the release of either? If so, state how & when.

Q. 15. For what purpose did you leave said deed of trust and bond with Samuel Chilton?

44 Q. 16. Was Samuel Chilton your attorney at law only, or was he constituted or appointed your attorney & agent in fact; &, if so, with what powers? and if in writing, say so, and where the writing is.

Q. 17. Where have you ever resided and been a citizen? And where were you a citizen in April, 1861? Were you a citizen of the State of Pennsylvania, and Samuel Chilton & Charles Stover citizens of the State of Virginia, on the 1st day of April, A. D. 1861, and after?

Q. 18. Did you know or were you informed of anything touching the said bond and deed of trust, which had occurred between said Charles Stover and Samuel Chilton between the 1st April, 1861, and the close of the war between the U. States and the Confederate States of America?

Q. 19th. When were you first informed of any settlement for you by Samuel Chilton with Charles Stover of said bond & deed of trust?

Q. 20th. When first informed after the said war, what were you informed in respect to said bond and deed of trust, and by whom?

Q. 21st. Was Samuel Chilton then dead; and did Charles Stover have possession of said bond and deed of trust, and did he produce

45 any receipts for the payment of said bond; if so, what receipts?

Q. 22nd. Did Charles Stover settle said bond with Samuel Chilton? If so, how?

Q. 23d. After the death of said Chilton & after the said war, did Charles Stover ever notify you that he had paid or pretended to pay off said bond to Samuel Chilton before his death?

Q. 24. Did said Charles Stover pretend that the said deed of trust had been released by said Samuel Chilton to him for you, and did he release the same?

Q. 25. What authority did you give your attorney, said Chilton, over said bond and deed of trust, by writing or verbal instruction?

Q. 26. Did you, in any manner, ever authorize him to receive in payment thereof either the bank-notes of banks of Virginia or confederate treasury-notes; and in what currency did you authorize him to collect the said bond?

Q. 27. Did you deposit the said deed of trust with said Chilton to be recorded, and said bond to be collected before the day when it was payable?

Q. 28. In reference to what currency or standard of value was said bond given?

Q. 29th. What have you found to have been the condition of

46 Samuel Chilton's estate at the time of his death? Was he, or not, notoriously insolvent, when he settled said bond with said Stover?

Q. 30th. Was Charles Stover aware of the pecuniary condition of Samuel Chilton when he made the pretended payments of said bond to him for you?

Q. 31st. Were said bank-notes of Virginia or confederate treasury-notes rec'd by Samuel Chilton from Charles Stover, in Virginia, for you in Pennsylvania, at par during the said war?

Q. 32nd. Where are the said bank-notes and confederate treasury, or either, now? Have you ever seen them, or have they ever been shown to you; if so, in whose hands were they & are they?

Q. 33. What were either said bank-notes or confederate treasury-notes

worth to you in Pennsylvania, at the time or times they are alleged to have been paid by Stover and rec'd by Chilton for you?

HENRY A. WISE,
For H. A. Wise & Geo. D. Wise, Counsel p. q.

Richmond, August 10th, 1870.

47 *Acknowledgment of service.*

This notice has been served on me, who am counsel for the defendant Stover only.

W'M GREEN.

Service acknowledged of this notice for James Chilton, William E. Hurxthall, & Virginia, his wife.

I. V. CHILTON,
Att'y for them.

Dedimus.

UNITED STATES OF AMERICA,
District of Virginia, ss:

The United States of America to James B. Lambert, notary public, Douglestown, Bucks County, Pennsylvania, greeting:

We, reposing special confidence in your fidelity and provident circumspection, do hereby authorize and appoint you to take the testimony in writing of Isaac Fretz and others, whom you are hereby authorized and required to bring before you at such time and place as you may designate and appoint for that purpose, and that at such time and place you will proceed to examine, under oath, said witnesses upon the interrogatories
48 hereunto annexed, at the instance of the plaintiff in a certain cause now pending and undetermined in our circuit court of the United States for the district of Virginia, before the judge thereof, wherein Isaac Fretz plaintiff and Charles Stover and others are defendant'. The answers of the witnesses to the annexed interrogatories you will cause to be reduced to writing in the order in which they shall be answered, and shall then be signed by said witnesses. At the foot thereof you will add a certificate subscribed by yourself, stating that it was sworn to and subscribed by said witnesses, and the time and place when and where the same was taken; which said examination of said witness' so taken, with your certificate thereto attached, you will send, directed to our clerk of our circuit court of the United States for the district of Virginia, sealed, with the names of the parties litigant endorsed thereupon, with early dispatch, together with this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Richmond, Virginia, this 31st day of August, in the year of our Lord one thousand eight hundred and seventy, and of our Independence the 94th.

[SEAL.] W. H. BARRY, *Clerk.*

49 *Deposition of Isaac Fretz.*

Deposition of witness produced, sworn, and examined by me the twentieth day of September, A. D. 1870, at my office, in Douglestown Borough, county of Bucks, and State of Pennsylvania, between the hours of sunrise and sunset of said day, by virtue of the annexed rule

of the United States circuit court, district of Virginia, and notices, interrogatories, and commission hereto attached, for the examination of witnesses in a certain cause depending in said court wherein Isaac Fretz is plaintiff and Charles Stover and others are defendants.

Isaac Fretz, sworn.

Isaac Fretz, of Bucks County, State of Pennsylvania, aged sixty-three years or thereabouts, being produced, sworn, and examined on the part of the plaintiff, deposeth as follows:

In answer to the first interrogatory he answers as follows: Myself and wife had a law-suit with Abraham F. Stover, the father of Charles Stover, the defendant in this suit, which suit was commenced in the circuit court of Fauquier County, Virginia, and carried thence by appeal to the court of appeals of the State of Virginia. Said
50 Abraham F. Stover was a citizen of Virginia, and is now deceased. This suit was brought to recover my wife's share of her father's estate, which was in the hands of said Abraham F. Stover, as her guardian, to which office he had been appointed by the orphans' court of Bucks County, Pennsylvania. Said Stover left Bucks County, Pennsyvania, his then residence, on the ninth day of April, A. D. 1833, and was not heard from by me nor his residence known until 1845. As soon as I heard of his being in Virginia, I commenced the above suit against him. Before leaving Pennsylvania he *he* drew out of the Easton Bank, where it was deposited to his credit as guardian, two thousand one hundred and sixty-nine dollars, a part of my wife's portion of her father's estate, and took it with him. The balance of her portion of her father's estate he had already in his hands,

In answer to the second interrogatory the witness answers as follows: He died, I think, in 1851 or thereabouts. His death occurred shortly after a verdict was rendered against him in the suit above spoken of. After his death William M. Hulmes was appointed his administrator, against whom the suit was proce'ded in to final judgment, I think, in 1859 or 1860.

51 In answer to the third interrogatory the witness answers as follows: Charles Stover, one of the defendants in this suit, was, as I learned in his answer filed in this suit, left his executor and sole legatee.

In answer to the fourth interrogatory the witness answers as follows: As soon as judgment was obtained in the original suit against Abraham F. Stover's administrator, in 1859 or 1860, suit was commenced against Charles Stover, one of the defendants in this suit, to test the validity of certain deeds made by Abraham F. to said Charles, in the life-time of said Abraham F. Stover, for certain real estate situated in Fauquier County, Virginia.

In answer to the fifth interrogatory the witness answers as follows: Said Charles Stover and myself afterwards settled and adjusted said suit.

In answer to the sixth interrogatory the witness answers as follows: By said adjustment he became indebted to me in the sum of eight thousand dollars. The agreement entered into us was that he should pay three thousand five hundred and thirty-five dollars and forty-eight cents in cash, and the balance in two equal annual payments. He paid one thousand dollars to me in cash, and gave a note at thirty days
52 for two thousand and eleven dollars, being two thousand dollars and interest for the time the note was to run. The balance of

five hundred and thirty-five dollars and forty-eight cents he did not pay in cash as agreed upon. After the cash payment of three thousand dollars I was to take a bond of Sansom Bayley and others for, I think, fifteen hundred dollars, a bond of —— Owen for, I think, six hundred dollars, and the bond of ——Smith for, I think, seven hundred and fifty dollars. The balance of the five thousand dollars was to be secured by the bond of Charles Stover, accompanied by a deed of trust to be executed by him on a mill property of one hundred and thirty-five acres near Thoroughfare Gap, in Fauquier County, Virginia. This agreement was entered into in Warrenton, Virginia, I think, on the twenty-seventh day of February, 1861, and filed in the clerk's office there. The next morning Stover, Mr. Samuel Chilton, my attorney, and myself went to Alexandria, and on the day following he paid me the one thousand dollars above spoken of, and gave me the note for two thousand and eleven dollars. Stover did not have the bonds before spoken of with him, and it was agreed between him and Mr. Chilton, my attorney, that he should bring the bonds of Bayley, Owen, and Smith to Warrenton on a day fixed, and should then deliver them to Mr. Chilton,
53 my attorney, and should execute and deliver to Chilton for me a bond secured by a deed of trust as before mentioned for the balance due to me by said compromise. I understood from my attorney, Mr. Chilton, now deceased, that in accordance with said agreement Stover executed and delivered to him for my use a bond and deed of trust for the balance of the five thousand dollars due me on settlement. I am unable to give the date of said bond or its exact amount, as I never saw it, and the same is true with regard to the deed of trust; said bond and deed of trust were delivered to Mr. Chilton for me.

In answer to the seventh interrogatory the witness answers as follows: I know from information communicated to me by Mr. Chilton, my attorney, and the answers of Mr. Stover filed in this case, that he, Stover, executed a bond signed by himself and payable to me, which bond was left in charge of Mr. Chilton for me. When said bond was dated, when payable, and what was the principal sum, I am unable to state.

In answer to the eighth interrogatory the witness answers as follows: Said bond was, as I was informed by Mr. Chilton, and by the answer of Charles Stover filed in this case, secured by a deed of trust signed and executed by Charles Stover; by whom witnessed I am unable to
54 say. It was delivered to Samuel Chilton, my attorney, and left in his possession.

In answer to the ninth interrogatory the witness answers as follows: My attorney at law in the suit against Charles Stover was Mr. Samuel Chilton, late of Fauquier County, Virginia, now deceased. I had no knowledge of his pecuniary condition or responsibility at the time of the compromise made with Charles Stover in 1861, or prior thereto, or subsequently, until within a short time before his death. So far as I know he had no relation with Charles Stover. He was a citizen of the same county and a neighbor, but not otherwise related, to my knowledge.

In answer to the tenth interrogatory the witness answers as follows: When the agreement between Stover and myself above spoken of was made, it was also agreed between Mr. Chilton and myself that he should receive two thousand dollars in full satisfaction for all fees, costs, and charges in the suits of myself and wife against Abraham F. Stover and the suit against Charles Stover in which the adjustment was made. Of this sum I had paid him three hundred and nineteen dollars before

the compromise, and his agreement was that he should retain out of the note for two thousand and eleven dollars the balance of sixteen
55 hundred and ninety-two dollars due him, and send me by express, when received, the difference. This note for two thousand and eleven dollars was, as Mr. Chilton afterward admitted to me, paid to him by Stover, but the balance due me was retained by Mr. Chilton and never forwarded to me as promised. At the time of his death I did not owe him anything for services rendered to me in the above-mentioned suits or in any other behalf. On the contrary, he was indebted to me the balance on the note for two thousand and eleven dollars, which he had collected and neglected to pay over.

In answer to the eleventh interrogatory the witness answers as follows: The deed of trust was taken on the mill property, containing about one hundred and thirty-five acres situate near Thoroughfare Gap, Fauquier County, Virginia, and owned by Charles Stover. It was given, as I am informed and believe, to me.

In answer to the twelfth interrogatory the witness answers as follows: I had no agreement or understanding with Charles Stover or Samuel Chilton or any other person that said deed of trust should not be recorded. Mr. Chilton promised to have it recorded and every thing done to secure the money due me. If said deed of trust was not recorded, it was the fault or neglect of Samuel Chilton, and in vio-
56 lation of his promise to me. Whether it was recorded or not I do not know.

In answer to the thirteenth interrogatory the witness answers as follows: I returned to my home the second day after the adjustment. My home was then in Bucks County, Pennsylvania, and has been there ever since.

In answer to the fourteenth interrogatory the witness answers as follows: After returning home I received, in 1864, two letters from Mr. Chilton, in which he said he had the bonds safe and would keep them safe, as he could collect nothing only in confederate money, and that would be of no value to me. In the fall of 1865, I went to Warrenton, V'a, and saw Mr. Chilton. He said my bonds were all safe, and he was going to keep them safe; that he had collected no money except the two thousand and eleven dollar note. I saw him again some months afterwards, and he acknowledged having collected the Owen bond, but denied having collected anything from Bayley or Stover, and showed me a letter from Stover, stating that he was ready to pay the bond in confederate money, and that as Chilton held it he had a right to receive it. Mr. Chilton said he did not take it because the confederate money would have been of no use to me. Mr. Chilton never acknowledged to me that he had received payment of the bond or deed of trust from
57 Stover. I have had no communication, either verbal or written, with Charles Stover, in relation to the bond or deed of trust since we parted at Alexandria in February, 1861.

In answer to the fifteenth interrogatory the witness answers as follows: Said bond and deed of trust were to be left with Mr. Samuel Chilton, to be by him recorded and kept safely for me.

In answer to the sixteenth interrogatory the witness answers as follows: Samuel Chilton was my attorney at law only, and was never appointed my agent or attorney in fact except to receive said bond and deed of trust and to have them recorded and preserved for me.

In answer to the seventeenth interrogatory the witness answers as follows: I have always resided in and been a citizen of Pennsylvania. I was a citizen of Pennsylvania in April, 1861. I was a citizen of that

State, and Samuel Chilton and Charles Stover were citizens of the State of Virginia, on the first day of April, 1861, and continued so to be until the death of Mr. Chilton.

In answer to the eighteenth interrogatory the witness answers as follows: I did not know nor was I informed of anything touching the said bond or deed of trust which had occurred between said Charles Stover and Samuel Chilton between the first of April, 1861, and
58 the close of the war between the United States of America and the Confederate States.

In answer to the nineteenth interrogatory the witness answers as follows: I was first informed of any settlement for me by Samuel Chilton with Charles Stover of said bond and deed of trust in 1866, and I think by Gen'l William H. Payne, whom I had then employed as my attorney.

In answer to the twentieth interrogatory the witness answers as follows: I was first informed, after said war, by Mr. Samuel Chilton that said bond and deed of trust were safe in his care and custody. I afterwards learned through Gen. Payne that they had been paid to Mr. Chilton during the war by Mr. Stover in confederate money.

In answer to the twenty-first interrogatory the witness answers as follows: I think Samuel Chilton was living when I first heard of the payment of said bond and deed of trust, but died soon afterwards. I do not know whether Charles Stover had possession of said bond and deed of trust, or not. I never saw him after parting from him at Alexandria in February, 1861, nor have I had any communication with him.

In answer to the twenty-second interrogatory the witness answers as follows: I cannot answer this question, as I have no knowledge
59 on the subject.

In answer to the twenty-third interrogatory the witness answers as follows: Charles Stover did not notify me as enquired of in this question.

In answer to the twenty-fourth interrogatory the witness answers as follows: I have had no communication with Charles Stover on the subject, nor do I know whether Samuel Chilton did or did not release said deed of trust to Stover for me. If he did, it was without any authority from me.

In answer to the twenty-fifth interrogatory the witness answers as follows: I gave Mr. Chilton, my attorney, no authority over said bond and deed of trust, except to take charge of them and keep them safely for me, and to have the deed of trust recorded; all of which he promised me to do.

In answer to the twenty-sixth interrogatory the witness answers as follows: I never authorized him in any manner to receive, in payment of said bond or deed of trust, either the bank-notes of banks of Virginia, or confederate treasury-notes. I never authorized Mr. Chilton to collect said bond or deed of trust in any currency. The payment of either of them to him was never spoken of between us.

60 In answer to the twenty-seventh interrogatory the witness answers as follows: The bond and deed of trust came into the hands of Mr. Chilton at the time and in the manner mentioned in my answer to the seventh interrogatory.

In answer to the twenty-eighth interrogatory the witness answers as follows: In reference to gold and silver, the legal standard of value and currency of the United States.

In answer to the twenty-ninth interrogatory the witness answers as follows: I found Mr. Chilton at the time of his death to be insolvent. From what I can learn on the subject, he was notoriously insolvent at

the time the alleged settlement of said bond by said Stover with him took place.

In answer to the thirtieth interrogatory the witness answers as follows: I cannot say, as I am not informed therein.

In answer to the thirty-first interrogatory the witness answers as follows: The bank-notes of Virginia or confederate treasury-notes alleged to have been received by Mr. Chilton for me were not at par in Pennsylvania during the war.

In answer to the thirty-second interrogatory the witness answers
61 as follows: I never saw said bank-notes or confederate treasury-notes, or either of them, and have no knowledge where they or either of them now are.

In answer to the thirty-third interrogatory the witness answers as follows: At the time the said bank-notes or confederate treasury-notes were paid, as alleged, by Charles Stover to Mr. Chilton, and received by him for me, said bank-notes and confederate treasury-notes were of no value to me in Pennsylvania.

And further saith not.

ISAAC FRETZ.

I hereby certify that the above-named witness was duly sworn and examined before me, at my office in the borough of Douglestown, county of Bucks, State of Pennsylvania, on the twentieth day of September, A. D. one thousand eight hundred and seventy, during the hours named in the foregoing caption, and that he subscribed his name thereto in my presence and at the time above stated.

In witness whereof I have hereunto set my hand and affixed my official seal, at Douglestown aforesaid, this twentieth day of September, A. D. one thousand eight hundred and seventy.

[NOTARIAL SEAL.] JAMES B. LAMBERT,
Notary Public.

62 *Exceptions.*

The def't, Stover, excepts to such part of the deposition of Mr. Fretz as relates to his transaction with Chilton, in relation to the want of authority to act as his agent in the collection of the money secured by the deed of trust, on the ground that it related to a transaction had with a party who is dead, and was at the time of taking the deposition.

RALPH STOVER, *Def't,*
By his Sol.

Agreement of counsel.

It is admitted that the judg'ts mentioned in the compromise in Penn. have not entered satisfied.

H. A. & J. S. WISE.

MAY 10, '73.

And now, at this day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at the city of Richmond, in said district, on Saturday, the 17th day of May, 1873:

Final decree—dismissing.

This cause came on to be heard at this term, and was argued
63 by counsel; and thereupon, upon consideration thereof, it was adjudged, ordered, and decreed that the bills of the plaintiffs be dismissed, and that the defendant, Ralph Stover, executor of Charles Stover, deceased, recover against said plaintiffs the costs of himself and his said testator, by him about their defense in this behalf expended.

17 May, 1873.

HUGH L. BOND, *C't Judge.*

Appeal allowed.

And the plaintiff having prayed an appeal from this decree, it is allowed him, upon his complying with the requirements of the law, and executing an appeal-bond conditioned according to law in the penalty of two hundred dollars.

HUGH L. BOND, *C't Judge.*

Appeal-bond.—Filed June 24th, 1873.

Circuit court of the United States of America, eastern district of Virginia.

ISAAC FRETZ AND CATHARINE, HIS WIFE,
vs.
RALPH STOVER, EXECUTOR AND SOLE TESTAMENTARY devisee of Charles Stover, deceased, William E. Hurxthall and Virginia Hurxthall, his wife, and James O. Chilton.

64 Know all men by these presents that we, Isaac Fretz and William B. Styer, of Sellersville, Bucks County, eastern district of Pennsylvania, are held and firmly bound unto Ralph Stover, ex'or, &c., of Charles Stover, dec'd, William E. Hurxthall and wife, and Charles O. Chilton, in the sum of two hundred dollars, to be paid to the said Ralph Stover et als., their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this twenty-third day of June, A. D. 1873.

Whereas the above-named Isaac Fretz and wife hath prosecuted an appeal to the Supreme Court of the United States of America, to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the eastern district of Virginia:

Now, therefore, the condition of this obligation is such, that if the above-named Isaac Fretz and Catharine, his wife, shall prosecute
65 their said appeal to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ISAAC FRETZ. [SEAL.]
W. B. STYER. [SEAL.]

Sealed and delivered in presence of—
CHA'S P. CLARKE,
U. S. Commissioner, Eastern District of Pennsylvania.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

I, William B. Styer, of Sellersville, Bucks County, Pa., in the district aforesaid, surety on the within bond, do solemnly swear that I am worth the sum of two hundred dollars over and above all my just debts, liabilities, and exemptions.

W. B. STYER.

Subscribed and sworn to before me, at Philadelphia, in the State and district aforesaid, this 23d day of June, 1873.

CHA'S P. CLARKE,
U. S. Commissioner, E. D. of Penn'a.

66 UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, hereby certify that the foregoing contains a true and perfect transcript of the record, process, and proceedings in a cause determined in said court, wherein Isaac Fretz and wife are complainants, and Charles Stover's executor et als. are defendants.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Rich', in said district, on this 25th day of June, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the 97th.

[SEAL.] M. F. PLEASANTS, *Clerk.*

(Indorsement on cover:) No. 447. Isaac Fretz & Catherine, his wife, appellants, vs. Ralph Stover, ex'or, &c., of Charles Stover, dec'd, W'm E. Huxthall & Virginia, his wife, & James O. Chilton. E. Virginia C. C. U. S. Filed 9th July, 1873.

IN SUPREME COURT OF THE UNITED STATES.

No. 164.

Fretz and wife vs. Stover's ex'or, &c.

BRIEF AND NOTE OF ARGUMENT,

BY

H. A. & J. S. WISE, Counsel for Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES.

FRETZ AND WIFE v. STOVER AND ALS.

BRIEF FOR APPELLANTS, FILED BY H. A. & J. S. WISE.

Facts of the Case.

For many years prior to February 25th, 1861, a suit or suits had been pending in the courts of Virginia and Pensylvania between Isaac Fretz and wife, residents of Bucks county, Pennsylvania, complainants, and Abraham Stover, formerly a resident of Bucks county, Pennsylvania, but latterly a resident of Fauquier county, Virginia. The object of the suit or suits was to recover large amounts claimed to be due by Abraham Stover as guardian of Fretz's wife, Catharine, whose maiden name was Stover—those suits were prosecuted to judgments in 1859 or 1860, Abraham Stover having died meanwhile, and one Hume having defended them as his administrator. And thereupon Fretz and wife instituted a suit in the court of Fauquier county against Charles Stover, to test the validity of certain deeds for lands in Fauquier, made by said Abraham, in his lifetime, to said Charles ——. Samuel Chilton had been the counsel of Isaac Fretz and wife in the litigation. February 25th, 1861, the controversy between Fretz and wife was adjusted by Fretz and wife agreeing to accept, and Charles Stover agreeing to pay, $8,000 in full of their demand (pp. 20, 14 and 15 of

record). Charles Stover was to pay a certain amount in cash and to execute his bonds for the balance, one payable March 1st, 1862, for $2,299 22, and one payable March 1st, 1863, for $2,366 18, and to secure the payment of said bonds by placing in such persons' hands as might be agreed upon, bonds of others to Charles Stover, which might be regarded by Fretz's counsel, Samuel Chilton, as solvent. And upon said Stover's compliance with the above terms Fretz and wife agreed to enter satisfaction of their judgments in Virginia and Pennsylvania against Abraham Stover. The terms above were not carried out. Charles Stover, Isaac Fretz and Samuel Chilton met in Warrenton, Virginia, in February, 1861, and thence went to Alexandria, Virginia, where Stover paid Fretz $1,000 in cash, gave him a note at thirty days for $2,011, of which $11 was interest, and they parted, Stover owing a balance of cash $535 48 and the two deferred payments. Instead of paying the balance of $535 48 in cash, and giving his bond, due March 1st, 1862, for $2,299 22, said Stover turned over to Fretz's attorney sundry bonds due him by others, as appears in exhibit B, page 15; and instead of securing the bond for $2,366 18, due March 1st, 1863, by placing in such persons' hands as was agreed on, bonds of others to said Stover, as provided by the agreement of compromise, Stover, who had assigned to Fretz the bonds referred to, in lieu of giving the bond which would have been due March 1st, 1862, secured the payment of the bond due March 1st, 1863, by a deed of trust to Samuel Chilton upon a farm and mill known as the "Trap Branch," in Fauquier, which deed bore date April 8th, 1861 (see p. 16, and pp. 8 and 9, and pp. 20 and 21). To the modifications of the agreement above specified Fretz and wife assented.

The whole litigation in this cause grows out of the bond due March 1st, 1863, secured by the deed of trust. The second day after the adjustment, to wit: February 27th, 1861, Isaac Fretz returned to his home in Pennsylvania (see p. 22, answer to 13th interrogatory). The bond and deed of trust were to be left with Mr. Samuel Chilton, to be recorded and by him kept safely for Fretz (p. 22, answer to 15th question). Samuel Chilton had been Fretz's attorney at law in the litigation then settled, and his functions as such then ended, and he was never appointed his agent or attorney in fact, except to receive said bond and deed of trust and to have them recorded and preserved for Fretz (p. 22, answer to 16th question, and p. 23, answer to 25th question). Fretz never authorized Chilton to receive payment of or to collect said bond in any currency. The payment of the bond was never spoken of be-

tween Fretz and Chilton (p. 23, answer to question 26th). The bond was given with reference to gold and silver. Samuel Chilton was fully paid for his services, as attorney for Fretz in the cases of Fretz v. Stovers, out of the note for $2,011, collected in March, 1861, and not only had no interest in said bond due March 1st, 1863, but had a balance of Fretz's money over and above his (Chilton's) fee in his hands from March, 1861, till his death (see pp. 21 and 22, answer to 10th question). It is not pretended that Fretz executed any power of attorney to Chilton to act for him, or that Chilton had any power to act as the attorney in fact for Fretz; and it is insisted that he had no power to act as attorney at law after he collected the money and took the bonds above in settlement of the litigation and received his pay in full. From the time the settlement was made Samuel Chilton's functions as attorney at law were ended; and the only authority left him, whether as attorney at law or in fact, was to receive from Stover the deed and bond, to have them recorded and preserve them for Fretz (see answer to 16th interrogatory, p. 22 of record). Fretz gave Chilton no authority over said bond and deed, except to take charge of them, keep them safely and have the deed recorded (answer to 25th interrogatory, p. 23). The payment of said bond was never considered or spoken of between Fretz and Chilton (answer to 26th interrogatory, p. 23). The agreement was made 25th February, 1861, (p. 14), at a time when war had not broken out, but was imminent and threatened to cause non-intercourse at any moment, and when it could hardly have been intended that Mr. Chilton should have the power to collect the money at all, and especially in a revolutionary currency which, if it could be sent to Pennsylvania at all, would be worthless at Fretz's residence, and especially worthless to Fretz, who never proposed being within the territory where it was current, or had any business there or use for money there. Fretz left for his home in Pennsylvania and never saw the parties again. All references to money were to gold and silver (answer to 28th interrogatory, p. 23). The deed and bond were executed and delivered to Chilton April 8th, 1861. Before Fretz could have taken the bond from Chilton's custody the war broke out; communication between the parties was entirely cut off, and not only was Fretz prevented from obtaining the bond or giving Chilton instructions about it, but he actually had not time before the outbreak of hostilities to get from Chilton the money he had in hand belonging to him.

Fretz solemnly swears he gave Chilton no power of collection. His

evidence shows not only that he did not give such power, but that Chilton knew he had not given it, for when he called for the bond (not the money collected on it) after the war, Chilton replied that it was safe in his care and custody (see answer to 20th interrogatory, p. 23). It would have been folly in Fretz to have given authority to Chilton to collect in Virginia notes or Confederate money in 1863, as mentioned above. They were worthless to him in Pennsylvania, and it is not pretended he would have used them where they were current. So that, if he had given Chilton power to collect at all, it would only have been to collect in gold and silver. But his testimony shows he had not considered or contemplated the necessity of having an agent to represent him when the bond fell due; that he, like thousands of others, never foresaw the impending struggle; that he expected to be able to be on hand when his bond fell due and collect it in gold and silver in person; or at that time to direct the collection; and that, when the chasm yawned between him and Chilton it merely left Chilton on one side with the bond in his hands for safe keeping, without power or instructions, and left Fretz on the other, unable to communicate to Chilton his wishes concerning it if he had any.

When the war ended, Fretz, into whose head the idea that Chilton had collected his bond or could collect it seems never to have entered, called on Chilton for it. Chilton knowing, doubtless, that he had been guilty of breach of trust in what he had done, concealed his conduct—pretended he still had it. Fritz demanded it, failed to obtain it, and employed General Payne to recover his bond from Chilton (answer to interrogatory 20, p. 23), when for the first time he discovered that the deed had not been recorded, and Chilton during the war had delivered it and the bond to Stover for State bank notes and Confederate money. Fretz at once repudiated the authority of Chilton to collect the bond at all; the existence of which authority Chilton's conduct and concealment equally disproved, and demanded payment of his debt from Stover. Some time was lost in parleying between the parties in the hope of arriving at a settlement, and all efforts at adjustment failing, this suit was brought to set up the deed of trust and compel payment. The bill, answer, exhibits, amended and supplemental bill, and answers and exhibits, substantially develop the above facts. Some affirmative matters—not denial of matters in the bill, were set up in the answers, but no evidence being taken to sustain them it is unnecessary to notice them. Such, for example, is the averment in the answer of Ralph Sto-

ver, that S. Chilton continued Fretz's agent after discovery of the transaction, and thereby Fretz affirmed his acts. That was false and new matter first presented in the answer and not proved. The only deposition taken was that of Fretz.

The cause first came on to be heard May 17th, 1873, whereupon the bill was dismissed with costs. No reasons were assigned by the court.

It is contended that the decree was erroneous; because,

1st. Samuel Chilton never was, by express appointment or implication, the attorney at law or in fact of Fretz to collect said bond at all.

2d. If he was authorized at the time he received the bond to collect it when due, his appointment was made in ignorance of and without reference to the contingency of war, and in its very nature revoked by its breaking out.

3d. If he was agent or attorney with power to collect, and the breaking out of war did not revoke and terminate his agency, he had no right or power to take or Stover to pay anything but gold and silver.

4th. Granting to Chilton every power which Stover contends he had, the power he did exercise, in view of the mode in which and time it was exercised, was in collusion with Stover, to the destruction of his principal's debt, without possibility of benefit to any one but Stover and himself.

I.

Samuel Chilton never was, by express appointment or implication, the attorney at law or in fact of Fretz *to collect said bond* at all. It is true the bill (which was drawn by other counsel than the present) says the bond was left with Chilton, as attorney at law of Fretz, "for collection at its maturity;" but the frame of the bill in other portions is sufficient to cover the position above taken, and it is manifest that the foregoing statement was merely the inaccuracy of counsel, for Fretz's deposition (answer to 15th, 16th, 25th, and 26th interrogatories, pp. 22 and 23) denies that Chilton was authorized to collect. Fretz residing in Pennsylvania and the draftsman in Richmond, receiving Fretz's statement of his case through a third party (General Payne), accounts for this inaccuracy. The relation between Chilton and Fretz, of attorney at law and client, was terminated when the bond and deed were taken. The litigation was closed, the whole need of counsel passed, and even the presumption of right to collect the bond and get his pay, which Chilton might under some circumstances have had, did not arise in this case, for he was fully paid

for his services out of the $2,011 note even before the bond and deed were given. The recording of the deed was all that remained to be done, and that was strictly no part of his duty as attorney, but a friendly act, which any one might have attended to for Fretz; and Fretz's deposition, uncontradicted, establishes that Chilton was not only no longer acting as attorney at law, but was not even acting as general attorney in fact, but simply as special attorney in fact, for the sole and only purpose of recording the deed and holding the bond for Fretz. This view has been elaborated sufficiently in the statement of the case. As the nature of Samuel Chilton's relation to Fretz in this aspect is a question of fact rather than of law, to pursue it further would be to reiterate the statements above made, and we leave it, repeating that the situation of the parties, and their conduct at the time and subsequently, show conclusively that both regarded and intended that the agency or attorneyship of Chilton was ended, except as to his duty of recording the deed and bond and holding them subject to Fretz's future order. If such was their true relation he manifestly had no right to receive payment, even in gold or silver.

II.

If he was authorized at the time he received the bond to collect it when due, his appointment was made in ignorance of and without reference to the contingency of war, and in its very nature revoked by its breaking out.

In the outset we are prepared to admit and do admit that it is a well-settled question that the breaking out of war between the countries in which a principal and his agent reside respectively does not necessarily revoke or annul the agency. In no State oftener than in Virginia has this doctrine been affirmed, as, for example, in the case of Manhattan Company vs. Warwick, 20 Gratt., 614, and cases there cited; id., vol. 2, Bigelow's Life and Accident Insurance Reports, p. 168; and in case of Zetelle v. Myers, 21 Gratt., 733; Hale v. Wall, &c., 21 Gratt., 424; King v. Hanson, 4 Call, 259; and the same doctrine is affirmed in this court in Ward v. Smith, 7 Wal., 447. (See also 19 Johns., 137, Buchanan v. Curry.) But we insist that in every case in which the validity or continuance of such agencies was affirmed the agency was created by express act of the principal, with the intention that it should continue during the war; that he being unable to be in his agent's country might be represented, and his estates there managed and conserved without a

violation of the laws of non-intercourse. Or, if not so created, the agency which was declared to continue was one of a general nature which had pre-existed, and which it was necessary should continue for the preservation and execution of the constituent's contracts or the satisfaction of his obligations. Thus the agency in King v. Hanson and Zetelle v. Myers, and cases of that class, were made with intent that they should continue during the war and the agent should act for the principal notwithstanding war. This is the one class; the agent of the Manhattan Life Insurance Company represents both classes. In that case the agency had existed long before the war; through it numerous obligations local to Virginia had been assumed by the principal; obligations to receive constantly recurring payments on policies of the principal, which required its presence by agent in Virginia; obligations which could not be avoided by its withdrawal of its agent, and so, in the absence of an express revocation of the powers of that agent, in view of its obvious duty to be represented, and of the fact that by withdrawing him it would lose its premiums without escaping its liabilities, the agency was held to continue. So, doubtless, in all this class of cases the agency being necessary to the discharge of the obligations, the conservation of the property, or the conduct of the business of a principal, is held to continue in spite of war; for, as has been truly said, war between States is not war upon the private property of individuals, and the law of non-intercourse is not violated by the mere receipt of his funds by an enemy's agent; and the prospect that an agent receiving his alien principal's funds will violate the laws of non-intercourse by attempting to transmit them is too remote to justify the rule that an alien cannot be represented. Not only does the policy of war proceed from its humane aversion to the needless oppression and impoverishment of an alien who has left property in the enemy's country, by denying him the right to be represented, but from the obvious motive also of having his property handled and conserved so that it may attract the laws of sequestration to it. But it is contended that the same policy that continued the agency in the class of cases above enumerated revokes it in the case in point. Every case of agency referred to above, while sustaining the continuance of the agency, denies the right of the agent to communicate or transmit through the lines the property or funds of his principal. Nowhere is the doctrine of non-intercourse between belligerents more ably elaborated than in Griswold v. Waddington, 17 Johns., 438, where the law of non-intercourse came in conflict with the law

of partnership, and was held to dissolve the latter. Thus, every agency which is sustained and held to continue notwithstanding war must be one which does not couple with the power of collecting the principal's funds the duty of transmitting them. Now, admitting the agency to Chilton, what was it for? To collect and pay debts? No. To receive payment of a debt which, if tendered in the enemy's country and refused, would be lost? No. To receive money and apply it to the principal's obligations or business within the enemy's lines? No. To collect and hold? No. It was to collect AND PAY. It was not a general agency; it was a special agency, peculiar in its case to the relation of attorney and client. The power to receive in such a case is so indissolubly bound up with the duty to pay over at once, that where the power of paying over is destroyed it creates the duty of refusing to receive, and when the inability to pay when collected is known to the debtor and agent, that destroys the power to act as agent. Can it be imagined or pretended that the agency was to collect and keep, or to collect and not pay? Prompt payment, immediate transmission, is the purpose of an attorney's employment. When it is impossible to execute the sole and only purpose for which he was employed his powers end. Wherefore we contend, whatever the law is governing pre-existing mercantile or business agencies, or agencies created with an express view to the existence of war, that where an attorney at law, whose duty is as much to transmit promptly as it is to collect, has, before the outbreak of war, in ignorance of and without reference to its early outbreak, been employed to make collection at maturity of a debt amply secured, the outbreak of war and existence of non-intercourse between him and client, destroying the power of transmission, annuls his agency to collect so long as that state of affairs exists, and that the debtor knowing the situation as well as the attorney, notice of such revocation is brought home to him and renders any such payment void.

There is a case of Pigeon v. Williams, &c., 21st Grat., 251, decided in Virginia since the war, to which some reference has been made heretofore in the court below, where a collection in Confederate money of an *ante bellum* debt was sustained and the attorneys not held liable. But in that case there is no similarity to this. The client resided in Virginia. The debt was not secured, and it was proved "that the attorneys could not have collected the debt at all if they had refused to receive Confederate money." See also Blackwell v. Willard, 65 N. C., p. 555, and cases cited; id., 6 Am. Report, 749; see also Zetelle v.

Myers, 21 Grat., 742, where it is admitted by the court that if Zetelle's object in appointing his agent had been not only to sell his property but to have it transmitted it would have been idle and void. Was not such the purpose and scope of Fretz's appointment of Chilton?

III.

If Chilton was agent or attorney of Fretz, with power to collect, and the breaking out of war did not revoke and terminate his agency, he had no right or power to take, or Stover to pay, anything but gold and silver.

No principle is better settled than that an agent appointed to collect *money* cannot receive anything else. Livermore on Agency, vol. 1, p. 198, lays it down that an attorney at law, merely as such, has no right to compromise a debt due his client; id., p. 201. A servant sent to receive money cannot bind his principal by accepting a bill instead. Even in the case of an auctioneer payment by a bill of exchange to him has been held not a valid payment for the purpose of discharging the debtor—Sykes v. Giles, 5 Mees. & Wels., 645. So, where an agent took a horse instead of money, the debtor was not discharged—5 Rob. Prac., p. 892; and so in 27 Ill., 525, Bank v. Chandler, accepting depreciated paper for a debt was held no discharge of it. So in Partridge v. Bank of England, 58 Eng. C. L. Rep., 396–425, the power of an agent to receive cash was held not to authorize him to receive certain warrants. So in Smock v. Dade, 5th Rand., 639, it was held an attorney has no right to receive a bond from a debtor in discharge of his client's claim without his client's assent. If he does he is the debtor's, not the creditor's agent, and creditor may still proceed against debtor. So in Williams, &c., v. Holloway, 7 Leigh, p. 277, where an attorney employed to collect a debt discounts from it one due by him to the debtor, and takes a third person's bond for the balance, his client was not bound. See also pp. 285, 289, 291. And so in Griffin v. Thompson, 2 How., 244, where a marshal received depreciated currency in satisfaction of an execution; if he return that he has done so the return was quashed and an alias execution issued. And in Ward v. Smith, 7 Wal., 447, it is held, without special authority an agent can only receive payment in the legal currency of the country, or in bills which pass as money at their par value by the common consent of the community. In this case of Ward v. Smith, the Bank in Alexandria during the war, and being in the Federal lines, held Ward's bond, due to Smith, for collec-

tion. Smith was in Virginia; Virginia bank bills were put in the bank where the bond was by Ward, between June, 1861, and April, 1862. The notes exceeded in nominal amount the face of the bond. The cashier of the bank endorsed the payments on the bond without Smith's knowledge. This court, while declaring the agency of the bank existed, held these payments invalid. So in Virginia, in the the case of Alley v. Rogers, 19 Gratt., 366, where a bank held notes of a non-resident owner, given prior to the war, the authority of the bank to receive Confederate notes was repudiated and declared void. We respectfully call the particular attention of the court to this case and those it cites, as similar to this, full, exhaustive, and pertinent. In this connection we also cite 7 Gratt., 138; 21 Eng. Com. Law, 163; 20 id., 453; 7 Cranch, 436–452; and 97 Eng. Com. Law Rep., pp. 449, 480, 486; Sweeting v. Pierce, 99 id., p. 534 to 542.

And this court has decided, in the case of Planters Bank v. Union Bank, 16 Wal., p. 483, that Confederate notes were not *money* but a commodity. They were not even a commodity to Fretz. How, then, could his debtor pay or his agent receive a commodity of this sort, totally valueless to Fretz, when the only authority pretended was the authority to receive money? It is indeed an odd state of law if this agent, whose only authority was to receive money, who could not have received a horse or a drove of horses which might possibly have been driven to Pennsylvania and have been of some use to Fretz, who could not take a diamond in payment, is to be held authorized in receiving in discharge of his client's debt a commodity which this court has pronounced not money, and which was next to worthless where he received it, and by no possibility could be of value to his client, unless that client violated the laws of non-intercourse and came where it was current to enjoy it. Not money, scarcely the mockery of money, and a commodity the taking of which could by no possibility have been contemplated by Fretz when he left his bond with him, for it not only did not exist, but the possibility of its existence was not even thought of.

IV.

Granting to Chilton every power which Stover contends he had, the power he did exercise, in view of the mode in which, and time it was exercised, was in collusion with Stover, to the destruction of his principal's debt, without possibility of benefit to any one but Stover and himself, and a collusive breach of trust between him and Stover.

Let us consider the circumstances, the time and the manner in which this payment was made. . The most that can be said of Chilton's position is that he was the agent of his alien principal to collect his bond. The character of such an agency has been described above. It is permitted, not from any regard for the agent, but to protect the private rights of the principal, which even war respects. An alien, by the laws of war, is permitted an agent in his enemy's country, provided he do not violate the laws of non-intercourse, that his property may be protected from plunder and robbery, neglect, devastation and abandonment, that his estate may be conserved and shielded from the malice, the cupidity or wanton destruction of private individuals. True, it may be sequestrated by public law for public uses, but by the laws of international comity the idea of an alien's property being plundered or wasted, or appropriated by private individuals, is not tolerated. The theft, the mutilation, the destruction by private individuals of an alien enemy's private effects would be punished as severely as a like offence against the property of a citizen, for it is no part of the policy of war to wantonly destroy the private property of individuals. The policy is a policy to conserve, to mitigate the horrors of war, to make it fall as lightly as may be upon the private estates of non-combatants, to keep its horrors within the bounds of organization, and to make it something superior to the indiscriminate ravages and plunderings of Goths and Vandals.

From such enlightened views sprung this policy of conservation; from it sprung the doctrine of toleration of agents of alien enemies, and from the policy of their permission spring their duties to their principals and their power over their estates. In its nature the trust confided to such an agent is very great. Its exercise must be attended with the greatest responsibility. As no instructions can lawfully be had from principal, no authority not contained in the original grant will be presumed, and no act can be done but such as is strictly within the scope of the agent's powers, or is done in the best of faith for the constituent's benefit. The absolute and uncontrolled power which the agent possesses, a power which in its nature cannot be supervised by his principal, between whom and himself communication is cut off, must be exercised with the utmost prudence, caution and integrity, and all forbearance of the appearance of hostility. Even if the authority be written, and as extensive as the English language can make it, these rules apply. (See Zetelle v. Myers, above.) And the *bona fides* of all his

acts is tested by the courts by a reference to these tests. If, having such trust confided to him, a scrutiny of his conduct in its administration discloses neglect, imprudence, bad faith, or, above all, that he has treated his principal as an enemy, a court of equity will hold him to a strict accountability and punish him with its severest penalties; and if others, either by active collusion or passive co-operation, the result of which they must if sensible men have foreseen would be injurious to his constituent, have derived benefits from his breach of trust, they, no more than the agent, will be allowed to reap the benefit of the wrong.

The principles which are applicable to all trustees are most strictly applicable to one whose control, powers and administration of his principal's estate, are so absolute and temporarily irrevocable and unsupervised. This relation, existing as it does in time of war, requires an integrity and *bona fides* even beyond that required of it in time of peace. Such was the trust of Samuel Chilton. Was he faithful to his principal? Is it possible to conceive that he believed himself doing the best he could for him when he accepted State bank notes and Confederate money? Chilton was a lawyer. He knew that the debt was amply secured; he knew that at most a legal tender would only stop the interest; he knew he was insolvent; that if he received it in gold he could not transmit it, and it would be spent before he could; he knew that bank notes and Confederate money were not legal tenders, and even if refused would not stop interest; he knew that he received it before it was due, and it was safer secured on realty than in his hands; he knew that if he received it in State bank notes and Confederate money he could not transmit them; that he had no power to use them where current for his principal's benefit, who had no business or debts there to which they could be applied; and that if he transmitted them to his principal they would not only be utterly worthless to him, but would render Fretz liable to criminal prosecution for their possession in Pennsylvania. Yet he did receive them, and spent them; and it is plain he knew he had violated his trust when he did so, for after the war, when called on for the bond by Fretz, he falsely stated that he still had it, and concealed his collection in Confederate notes. It is idle to descant upon the conduct of Chilton. It was glaringly faithless, culpable and hostile. How now as to Stover? Did he actively collude with, or passively with his eyes open assent to or participate in this fraud? If he had paid later than he did he might now contend that his conduct was pas-

sive; that he yielded to Chilton's solicitation that he should pay; but the dates of the payments conclusively negative this. Chilton could not demand payment until March 1st, 1863; the bond was not payable until then (p. 9). But Stover anticipated, and voluntarily (it must have been voluntary) paid part December 30th, 1862, and part January 15th, 1863. The motives for such payment are as plain as the payment itself. One was doubtless that of gain to himself; the other injury to Fretz. The first was legitimate, provided it did not involve the second. It may be said that it was no part of Stover's duty to protect Fretz; that Chilton looked out for Fretz, and Stover for himself. That is not true; for while it is true that it was no part of Stover's duty to represent Fretz, he had no right to do any act with his eyes open, the evident and inevitable result of which he must, as a sensible man, have known would be to release him without benefit to Stover. The bill avers that Stover knew Chilton was notoriously insolvent, and a careful reading of the answer shows that Stover does not deny the fact that he did know Chilton was insolvent. Fretz moreover testifies he was. Stover saw that the growing exigencies of war made Chilton greedy for means—gold, silver, State notes, Confederate money—anything to spend. Here was his opportunity to be rid of his heavy debt by a trifling sum, and to punish his enemy in war, and his and his father's adversary in many years of bitter, acrimonious litigation. That it was such see answer to 1st interrogatory, p. 20. There lay his adversary, bound as it were, gagged, helpless, unable to cry out; ignorant, in fact, of what was going on. Here was his faithless agent, pinched by the hunger of war, insolvent, spendthrift—only too glad to lay his hands on anything he could spend, and give any sort of receipt or acquittance demanded. The deed was unrecorded. That simplified matters greatly, and obviated the necessity of calling on Fretz to unite in the release of the deed of trust. At last, at last, fighting obstinately from court to court, as he and his father had been; both at law and equity defeated; forced, as he finally had been, to compromise; the opportunity of escaping his debt by nominal payment, without Fretz's even getting the benefit of that, opened up to him in most enticing form. Now, shall that farce of payment be upheld as to Stover, made as it was with a knowledge that it was no payment—made with the selfish motive of gain and the base motive of revenge—made to an insolvent with knowledge of his insolvency, whose agency to receive even

gold was doubtful—made in Confederate money, to be paid to a resident of Pennsylvania, who laughed at the audacity of the so-called rebels who issued it, and who was spending his substance then to crush it and its issuers from existence—made with the knowledge that even where current it was never a legal tender—made with a knowledge that it could not be sent to Fretz; that if sent it was worthless; that if Fretz received it he was guilty of a criminal offence against the Government of the United States?

If such a payment be sustained, then, so long as the war lasted, every northern creditor of southern men—every southern creditor of northern men—was at the mercy of his creditors.

We insist that it is shown under this head:

First. That whilst the humanity of Christian warfare allows an agent to do and act for a principal who is in an enemy's country in many essential ways and particulars; yet,

Secondly. He, and those transacting with him, must observe two limitations and rules of his authority: first, the agent must conserve and not betray the interests of his principal, nor those dealing with him aid in the betrayal; and, second, he and those who deal with him must do nothing to injure either belligerent power at war with each other. All the cases cited, and others, sustain these rules and limitations. Confiscation itself, for example, does not seize real estate and appropriate it if the alien enemy, by himself or agent, can *bona fide* sell and convey it to one who may lawfully purchase it "*before office found;*" but the act must not be in fraud of the "alien enemy" or of the laws and sovereignty of the place where the real estate is situated.—Fairfax v. Hunter, 7 Cranch, 603, and Robertson v. Miller, 1 Brock, 466. So, many other acts to save property from the chances of war are not only allowed but encouraged by belligerent powers. But if there be any acts or attempts to violate non-intercourse, or to do what is held to be contraband, there is forfeiture.

Now, in this case it is apparent from the record, not only, first, that Chilton, the attorney at law or in fact, no matter what were the powers which may be reasonably implied by his relation to his principal, was faithless and false to that principal; but Stover aided and urged him in the betrayal of his principal, knowing fully all the facts of the intent and effect of the wrong. And it further appears that the two combined, against the public policy of both powers at war, to punish an

innocent and non-combatant individual cut off from all access to them by a line of non-intercourse. Chilton, a morally weak, insolvent spendthrift, was tempted by Stover to betray Fretz—the one betraying his trust from indifference to the interests of a principal in the relation of a public enemy, and the other acting not only from sordid and mercenary motives of lucre, but with the vindictive purpose of punishing not only a personal enemy, but of injuring the cause of the United States in the rebellion.

We insist that the decree was wrong, and also that the following is substantially such as should have been entered:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

Fretz and wife
v.
Stover's ex'r and als. } The —— day of ———, 1873.

This cause came on to be heard at this term, and was argued by counsel, and thereupon and upon consideration thereof it was ordered, adjudged and decreed as follows, viz:

That the sum of two thousand three hundred and sixty-six ($2,366 18) dollars and 18-100, due by Charles Stover to the plaintiffs on March 1st, 1863, as evidenced by the bond of said Charles Stover, filed with his answer as Exhibit "Z," dated April 8th, 1861, was payable in lawful money of the Uuited States, and was not liable to be scaled as due in Confederate money; that Samuel Chilton was not the authorized agent of the plaintiffs, or either of them, to receive the sum of eleven ($1,100) hundred dollars, averred to have been paid him in Virginia bank notes on December 30th, 1862, or the sum of twelve hundred and sixty-six ($1,266) dollars, averred to have been paid him in Confederate notes on January 15th, 1863, as either part or full satisfaction of said debt, or to release the deed of trust dated April 8th, 1861, from Charles Stover to Samuel Chilton, trustee, filed as Exhibit "Y" with the bill. And that, as between the plaintiffs and Charles Stover, the payments aforesaid are null and void, and the deed of trust aforesaid is a valid and subsisting lien upon the property therein mentioned, to secure to the plaintiffs the payment of the sum of $2,366 18 and interest. The proceedings to appoint commissioners to sell, prescribing terms and mode of advertisement, &c., and concluding as follows:

And all proceedings hereunder are suspended for sixty (60) days, in order to allow the defendants time to pay the money above decreed, or to appeal herefrom if they shall so elect.

All which is respectfully submitted.

H. A. & J. S. WISE.
For appellants.

Supreme Court of the United States.

No. 164.

FRETZ AND WIFE

vs.

STOVER Et Als.

REPLY OF H. A. & J. S. WISE, COUNSEL FOR APPELLANTS.

Judd & Detweiler, Printers.

Supreme Court of the United States.

No. 164.

FRETZ AND WIFE *vs.* STOVER ET ALS.

REPLY OF H. A. & J. S. WISE, COUNSEL FOR APPELLANTS.

The appellees, as appears by their brief, rely upon a new matter of defence, which matter was not averred in the bill or set up by the answer of Charles Stover, either in response to the bill, or as new affirmative matter. The defence of the subsequent ratification, by failure to repudiate, could not have been plead, as, if it was a true defence, it was, in its nature, well known to Charles Stover when he filed his original answer, not then plead by him, and first appeared in an answer filed by his executor, who had no right to answer at all. It is a new matter, affirmatively averred, and as to which, even if it was admissible, he took as proof. It is alleged in the brief of appellees, as a fact, that "the complainant did not disa-"vow or object to such payment before the death of Chilton, "nor did he do so at all, before the commencement of the "suit—at least three years after he had full knowledge of the "fact." This cause discloses no such state of facts; it involves none such. However honestly such statement is made, it is, in point of fact, utterly unfounded, and altogether impertinent. If the question of subsequent ratification or tacit acquiescence had been properly raised in the court below, Fretz could and would have proved, promptly and by a score of witnesses, including all his counsel, that

he repudiated the transaction in question instantly on learning it; that the delay in suing was caused solely and altogether by the procurement and conduct of Stover, who, from time to time, both before and after Chilton's death, led Fretz to hope and believe they could arrive at an amicable adjustment, which proposals, at one time, went so far as the naming of arbitration; but it is as improper to asseverate in Fretz's favor as it was on the part of appellee's counsel to asseverate against him.

I.

In answer to first and fourth points of appellee's brief, which we apprehend to be identical, we will simply say: The defence of subsequent ratification or tacit acquiescence was necessarily new matter, which in its nature would first appear in an answer. The plaintiff was no more bound to aver that he had not released or acquiesced than he would in a declaration in debt have been bound to aver that a debt was due, *and had not been released.* He was not bound in his pleadings to undertake to prove a negative. To have anticipated such defence would have been false pleading. The assertion of his claim by bill was a sufficient allegation that he had never done anything to destroy his claim. If he should have negatived this defence, he should have negatived every other that might have been made. Charles Stover, then alive, cognizant of every circumstance, promptly ppeared, answered the bill, and *set up no such defence.* His answer was filed May 30th, 1871, long before his death, and two years before that filed by his executor.

No one knew better than Charles Stover the absurdity of such a plea. He had caused the delay in bringing suit, and never dreamt of such a plea. Now, had he lived and had he relied on such a defence as the executor now pleads, he could not have made it after his original answer was filed. He could not have filed a supplemental answer. "*A sup-*

plemental answer must embrace new matter discovered after the original answer was placed on file; an amendment will not be allowed, based on matters known to the defendant at the time of filing the original answer." (Suydam *vs.* Truesdale, 6 McL., 457; also Equity Rule 60.) If Charles Stover himself could not have filed such, much less can his executors. In the first place, the bill of revivor and supplement was merely filed under Equity Rule 56, and called on Stover's executor for no answer. The bill contained no prayer for his answer. It only called on him to come forward and defend a suit of his testator wherein that testator had answered and an issue had been joined and testimony closed long before. A suit in which his testator could not plead anew or supplement. If he had a right to answer at all, his right could not be greater than that of his testator. Therefore, so much of his answer as set up new defences was mere surplusage and was ignored. The defence is manifestly one which, if it was true, was well known to his testator when he answered and it had not been made. The testimony had been all taken, and none of it was addressed to the point. No evidence could have been taken upon the question; it was not in issue; and if such evidence had been taken it would have been rejected. (Taylor *vs.* Luther, 2 Sum., 229.) It was then too late for the defence if it was too late for evidence as to it. But, even if such defence, as made, was admissible, it was entitled to no weight whatever, for the executor did not attempt to prove it, or even assert that it was plead as matter within his own knowledge. "The answer of a "defendant who has no personal knowledge of the facts "stated, and whose conscience cannot thereby be affected, "is not evidence, though responsive." (Dutilh *vs.* Coursault, 5 Cr. C. C., 349.) He did not pretend to answer as of his own knowledge, and took no testimony to sustain it. "If the answer be not responsive to the bill, but rely on "new facts by way of discharge or avoidance, they must be "established by independent proof." (Randall *vs.* Phillips,

3 Maj., 378; Flagg *vs.* Mann, 2 Sum., 489; Gernon *vs.* Boccaline, 2 W. C. C., 199; Tilghman *vs.* Tilghman, Bald., 465.) "When an answer admits a fact and insists on a distinct matter by way of avoidance, the fact admitted is established, but the matter in avoidance must be proved." (Clements *vs.* Moore, 6 Wal., 299.)

Wherefore we insist that the circuit court had no right to consider, if it so did, the question of subsequent ratification or tacit acquiescence by Fretz. That defence was, if true, known to Charles Stover when he plead, and not set up, and as a consequence could not be plead afterwards, either by him or his executor; or if it could be, was new affirmative matter requiring proof, which was never proved.

II.

So far from Fretz's knowing about the transaction in 1865, he swears that when he saw Chilton, in 1865, (p. 22,) he (Chilton) denied collection of the bond, and assigned reasons for refusing Confederate money. The Owen bond, the collection of which Chilton acknowledged, had nothing to do with this bond. (See p. 15.)

III.

The relation of trustee did not create Chilton Fretz's agent; on the contrary, it made him *the impartial stakeholder of both parties.* No relation of agency *for Fretz* can be inferred from his being trustee.

IV.

How strong against the appellees is the language under this head. They rely on a defence for Charles Stover after his death, which he never made, yet must have known if it was true; and which he would have been our strongest witness to disprove, if it had been made when he was alive. And the defence is not even made as of the personal knowledge of the party making it, or proved by any human being or circumstance.

V.

There is no similarity between this case and Hale *vs.* Wall. In that case the party with whom the bonds were left was not informed that they were secured by liens. The payment was made to him over a year before those made in this cause. His constituent was in Missouri within the Confederate lines, accessible to him; and although written to, he gave no instructions. The payments were nearly all made in solvent current bank notes available to Wall, who was within the Confederacy, and the funds not being called for were specially deposited and lost.

VI.

It is established that Chilton was insolvent. The bill avers that he was, and that Stover knew it. Stover does not deny the fact or his knowledge of it. Fretz moreover proves it. General Payne was first employed to recover *Fretz's bond* from Chilton. It was not to recover his money, (p. 23.) Whether communication between Warrenton and Pennsylvania was or was not easy, it was unlawful, and Fretz is surely not to be blamed for refusing or failing to violate the laws of his country.

VII.

The appellants were not bound to release the judgments until Stover complied with his agreement, but that defence was, like the other above named, a new one set up by Ralph Stover, and stands on the same footing. Still the decree might easily have put Fretz and wife on terms as to releasing before sale and accomplished the desired end.

All which is respectfully submitted.

H. A. & J. S. Wise,
For Appellants.

Washington, *January* 30, 1875.

Supreme Court United States.

ISAAC FRETZ, &c.,
v.
RALPH STOVER, Ex'r, &c.
No. 164.

Additional Points and Authorities of Appellee.

I.

The bill of complainant was filed August 9, 1869. This was all that appears to have been done, except that decree *pro confesso* was taken in November, 1869, until August, 1870, when the deposition of the complainant, Fretz, was taken in support of the bill. In May, 1871, the bill was amended by adding new parties by consent; and then the answer of Charles Stover was filed (p. 5). No further proceedings were had before the death of said Stover, whose will was admitted to probate, June 12, 1872, (p. 11), by which Ralph Stover was appointed executor. January 16, 1873, was filed bill of review (p. 9), and, on the same day, subpœna issued to Ralph Stover, calling upon him "to answer the original bill of complaint," and the bill of review (p. 12). The answer of Ralph Stover was filed in obedience to this May 7, 1873, "*at a court*," held at that time (p. 13).

No replication was ever filed, either to the original answer, or to the answer of Ralph Stover. No objection was made to this answer of the executor, and upon those

proceedings the cause was heard *without objection*, and without any offer to file a replication, and thereupon a decree was made, dismissing the bill.

II.

It is objected, that the answer of the executor, as it alleges matter of defence, in addition to what is in the original answer, should not be considered, because not filed by leave of the court, and upon motion, according to rule 60 of Practice in Equity.

But this answer was filed *in open court, without objection*, and it is too late to take the objection now. See 6 Wall, 299.

Besides, the prohibition of that rule applies to answers filed *after replication*.

There had been no proceedings whatever since the filing of the original answer, and the filing of this answer, except the proceeding to revive the suit. By such revival, the executor was placed in the precise situation of the original defendant, at the last proceeding before his death, with all his rights and privileges. Had there been replication filed, no doubt the requirements of this rule could have been insisted upon, but they were waived.

III.

There being no replication to either of these, they are to be taken as conclusively true "in all points," whether responsive to the bill or not.

7 John. Ch. 222; 2 Cowen 118; 6 Mumf. 142.

The reason of this, as stated in the first two cases above cited is, that "the plaintiff, by not replying, has excluded the defendant from the opportunity of proving his averments."

This rule applies, even to where the defendant simply states, that he believes, and hopes to be able to prove such, and such matters.

7 John. Ch. 222; 1 Vernon, 140.

According to this, the allegations in the original answers, that the said payments may have been due to Chilton, &c., on page 7, are to be taken as true.

(See also equity rule 66).

The amendment of the 24th is "for an amendment" to the original one [Rec 1st p. 13]

IV.

The allegations of the answer, (p. 14) concerning the ratification of the acts of the agent, and that the principal did not disavow them after they came to his knowledge, are directly responsive to the bill. The bill charges that Chilton had no authority to do what he did. It is responsive to this to say that he had, because his act was ratified, and it is a ratification that he did not disavow it. A ratification relates back to the transaction, and constitutes an authority from the beginning. An assertion therefore of the ratification of an act is, necessarily, a denial of want of authority. Ratification is equivalent to an original constitution of authority, and is, then, in direct opposition to the idea of want of authority.

V.

That Fretz did not disavow the act after it came to his knowledge, is proved also, by the deposition given by him (pp. 22 and 23, answers 14th and 24th int.)

Besides all this, the bill itself is defective, upon this point, in not stating that he did disavow it. It states that the facts came to his knowledge in 1865. It was not filed until August, 1869; and having disclosed so much,

it was incumbent upon him then to state further that he, upon becoming informed of the transaction, promptly disavowed and repudiated it. He only states in his bill, that, *at the time*, Chilton did not have the authority to do what he did under those circumstances, the positive act is required of him, that he should disavow, and this being so, he should state it in his bill, or his cause of action is not made out by the bill.

Even if the answer of R. Stover is not evidence, the fact is abundantly proved by other witnesses.

W. WILLOUGHBY,
Counsel for Appellee.

The Bill is defective for want of proper parties. This objection was made by answer.

"The personal representative of a sole or surviving trustee shall execute the trust, or so much thereof as remained unexecuted at the death of such trustree, whether the trust subject be real or personal estate."

Code of 1860, p. 735. I. H. & M., 330.

See also rule 52 of Courts of Equity.

10 Wallace 304

IN THE

Supreme Court of the United States.

FRETZ *et ux*,	*Appellants*,	}	NO. 164.
vs			
STOVER *et al*	*Appellees*.		

Points and Arguments of Appellees.

G. H. Ramey, pr., Alexandria, Va.

IN THE

Supreme Court of the United States.

ISAAC FRETZ and WIFE, Appellants,
vs
RALPH STOVER, Ex'or and others, Appellees,
} No. 164.

Points and Arguments of Appellees.

I

The Bill in this cause was filed August 9th, 1869, for the purpose of setting up a deed of trust that had been paid and satisfied in December, 1862, nearly seven years before, (pp. 1 and 2), on the ground that payment had been made in Virginia bank notes and Confederate money, to an agent, without authority.

The Bill states that the deed of trust was left with Samuel Chilton, as the attorney at law of the Complainant, for record, and the bond, which it was given to secure, "*for collection at its maturity*," (p. 2).

From the Bill, it appears, that the Complainant ascertained that such payment had been made, "when the war had closed," (p. 2), though in his deposition, he says, he was first informed of it in 1866, (p. 23).

Mr. Chilton died in 1867, (p. 14).

The Complainant did not disavow, or object to such payment, before the death of Chilton; nor did he do so at all before the commencement of the suit, at least three years after he had full knowledge of the fact,

and manner of payment, (pp. 14 and 22, answer to interrogatory 14th, and answer to 24th interrogatory, p. 23).

II

The Appellants contend that Mr. Chilton, who received the payments, and satisfied the deed of trust, had no authority to receive payment at all, and one of them so swears in his deposition.

But the whole case shows otherwise. The deposition is flatly contradicted by the Bill itself, which states, that the bond was left with him "*for collection*," as attorney at law.

He was the trustee in the deed of trust.

Even in the deposition, (p. 22), the Complainant states that he went, in 1865, to see Chilton about the collection, and talked with him about it; and that then, Chilton informed him of the collection of a part of the debt.

The answer states, particularly, that the deed of trust, and the bond were left with Chilton, "as agent and attorney," "it being the avowed purpose of respondent to pay off the said bond, at as early a period as he might be able to pay it," for which reason, the bond was written, "on, or before the 1st of March, 1863."

Mr. Chilton signed the satisfaction of the deed of trust as trustee, and signed all the receipts of payments as attorney for the Complainants, (pp. 9 and 16).

The Complainants knew that Chilton had assumed to act as their agent, in this respect, and that the Appellee, Stover, had dealt with him, as such, before Chilton's death, and more than three years before this suit, and never disavowed it; and they are estopped from denying his agency.

Besides this, the question is not whether he was, in fact, the agent for this purpose, but whether, by the acts of Complainants, they had given just cause to induce the party dealing with him, as such, to believe that he was such agent.

Payments had, before that, been made to Chilton, as attorney of Complainants, which had been recognized by them, (Exhibit B., pp. 15, 21 and 22).

Besides all this, Stover was authorized to infer that he, Chilton, had

the authority to collect, from the mere fact of his being in possession of the bond and deed of trust.

See 2 Sandford's Chancery Reports, p. 325.

III

But, it is contended, that, if there was an agency, it was put an end to by the fact of Chilton's being in an enemy's country during the war.

If this were true, the Complainants could not avoid his acts, as assumed agent, without disavowing them as soon as they became known to them.

But it is not true. "A person may have an agent in the enemy's country to collect debts due to him, and to preserve his property there."

Because it may have been illegal to remit, did not make it so to receive, and, the debtor could not lawfully refuse payment.

Hale *vs* Wall, 22 Grattan, 424.

20 Grattan, 635.

Ward *vs* Smith, 7 Wallace, 447.

Chilton was trustee, as well as agent; and no one ever contended that such an authority was terminated by the existence of the war.
He was not only the proper person to satisfy the deed of trust, but he was the only one who could do so.

IV

But, it is denied that Mr. Chilton had authority to receive in payment, Virginia bank notes, or Confederate currency.

It is a complete answer to this, that the Complainants, though they knew of this payment, at least in 1866, one year before Chilton's death, and three years before the commencement of this suit, in all that time, made no objection to such payment. They allowed the time to pass away, until the Appellees could have no recourse against Chilton, or the benefit of his evidence upon the subject.

"The only condition the authorities impose upon the principal, if any thing else than legal tender is received by his agent, is, *that he shall inform the debtor, that he refuses to sanction the unauthorized transaction, within a reasonable period after it is brought to his notice.*"

Ward *vs* Smith, 7 Wallace, 452.

The principal must *disavow* the acts of his agent, or he makes them his own.

The Bill does not even state, that any disavowal, or objection, was ever made.

In Bredin vs Dubarry, 14 Sergeant and Rawle, p. 27, where an agent had exercised his authority by giving a receipt in full, the Court say:

"There was no evidence that the authority of the clerk extended to transactions of this sort, but he undoubtedly was an authorized agent for some purposes, and I take it to be indisputable that a principal who neglects promptly to disavow an act of his agent by which the latter has transcended his authority, makes the act his own. He is bound to disavow it the first moment the fact comes to his knowledge."

In this case there had been a delay of three months.

In Cairnes *vs* Bleeker, 12 Johnson, p. 300, the Court say: "It is a salutary rule in relation to agencies, that when the principal has been informed of what has been done, he must dissent and give notice, in a reasonable time, or, otherwise, his assent to what has been done will be presumed."

"When the principal is informed of what has been done, he must dissent, and give notice of it in a reasonable time; and if he does not, his assent and ratification will be presumed. *Semper qui non prohibit pro se intervenire, mandare creditur. Procuratur qui recepit literas mandati, et statim non contradixit, videtur acceptare mandatum.*"

2 Kent's Commentaries p. 616.

See also Vienna vs Barclay. 3 Cow. p. 281. 4 Mason's, R. p. 296.

6 M'Lean, p. 109. 10 Alabama, pp. 756 and 771.

6 Mass., p. 127. 2 Johnson's Cases, p. 424.

10 Paige, p. 127. 25 Miss., p. 507.

Story on Agency, Section 255.

V

In Hale vs Wall, 22 Grattan, p. 424, payment of bonds in Confederate currency, and Virginia state bank notes, to an agent, under circumstances precisely similar to those of this case, was held to be a good payment, "*in the absence of instructions from the principal, not to receive such money.*" See also 20 Grattan p. 635.

The peculiar circumstances of such a case, have an important bearing upon the rule of law, as to such payments. In that territory, at that time, such currency was the only currency in circulation. It was in constant use; and by that standard, contracts were made, and all the business of society carried on. Payments were constantly made in such currency; and, in this respect, it was like the notes of banks, with which all business had been carried on, and which were always regarded as good payments, unless objected to *at the time.*

Chilton was undoubtedly the agent, and should have objected at the time. But he acknowledged it as a good payment, and satisfied the deed of trust, and delivered it up.

If, now, it should be held invalid, the Appellees suffer the loss of what was unquestionably of value to them, through no fault of theirs, but through the fault of the agent of the Appellants.

Surely, the very least that could be required, is that Fretz should, upon becoming informed of it, have been prompt in disavowing the act of his agent. There is no doubt, but that the payment, by the law of Virginia, was a good payment, as is shown by a series of decisions upon the subject.

VI

The Bill of complaint is framed upon the theory, that the payment, made as it was, was the result of a conspiracy between Stover and Chilton, to defraud Fretz.

This is wholly denied by the answer; and there is no proof in support of the charge. The circumstances, under which such payment was made show the most entire good faith. Mr. Chilton was an upright and faithful lawyer, as is shown, not only by the answer of Stover, but by the fact, that such implicit confidence had been placed in him by Fretz himself.

There is no evidence of his insolvency, at the time.

The statement of what Chilton told Mr. Fretz in the fall of 1865, as detailed in his answer to the 14th interrogatory, p. 22, is utterly incredible. It cannot be believed, that Chilton would have told such a falsehood, when the evidence of its being such was so easy to be procured, and so liable to be shown at once.

Why was General Payne employed as counsel, as Fretz says, before he knew of this transaction?

He did know of it, and it is evident that he employed him to prosecute Chilton, who was then living. He meant, then, to hold Chilton responsible, and that is the reason that he never mentioned the subject to Stover.

It is well known, as a matter of history, that, at about the time of this payment, and from that time to the close of the war, there was no great difficulty in communicating with Chilton, and Stover, at Warrenton by Fretz.

It is difficult to believe that Fretz, during all this time, was ignorant of this transaction. There was a very large sum involved, and he certainly shows great negligence on his part, if he did not know of it.

He says that Chilton wrote him twice in 1864, though he says that he told him a lie about his bonds.

Why are not the letters produced?

The deposition of Fretz is very suspicious, and leads us to infer that, if Chilton were alive, and we could have the benefit of his testimony, a very different state of facts might appear.

Under all these circumstances, to set up, and re-establish a deed of trust, paid and satisfied nearly seven years before, the party all that time making no objection whatever, and making no objection, after he admits that he knew all about it, during which time, the party knowing all about the transaction has died, and we are deprived of the benefit of his testimony, and our power to make a claim upon Chilton has become lost, or at least much impaired, would be so palpably unjust, and inequitable, that it cannot be that such an idea can be entertained by the Court.

VII

The Complainants have not complied with their agreement, to discharge certain judgments mentioned in said agreement, (pp. 15 and 24).

It does not appear that they offer so to do.

They had not the right, then, to call upon Stover for the payment of the notes, at the time of filing their Bill, nor have they such right now.

It was proper to dismiss the Bill upon this ground.

The decree of the Circuit Court should be affirmed.

W. WILLOUGHBY,

Counsel for Appellees.